FILED
MAR 23 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 3[redacted]101

THE COCA-COLA COMPANY,
Petitioner,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, THE KOKE COMPANY OF ARKANSAS,
Respondents.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF AND ARGUMENT FOR THE PETITIONER.

HAROLD HIRSCH,
FRANK F. REED,
EDWARD S. ROGERS,
FREDERICK W. LEHMANN,
CHARLES E. RUSHMORE,
Counsel for Petitioner.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX OF SUBJECT MATTER.

	PAGE
STATEMENT	1
Petitioner's case	2
Respondents' defense	4
The evidence	5
J. C. Mayfield	6
Petitioners' and respondents' labels compared	11
Respondents' imitation of petitioner's barrels	12
Organization of respondent companies	12
Business card of respondents' salesmen	13
Passing off of respondents' beverage as and for Coca-Cola	14
The defense of anticipation and its disbelief by the lower courts and the Patent Office	16
The Rucker record	18
District Court opinion	19
Decree of District Court	21
Opinion of Circuit Court of Appeals	23
ASSIGNMENT OF ERRORS	25
PROPOSITIONS AND AUTHORITIES	28

THE ARGUMENT 32
Pemberton Chemical Company 32
Origin of Coca-Cola 32
Origin of the name 35
Petitioner's title 40
Respondents' claim of title 41
Coca-Cola a distinctive beverage 42
Imitations 47
Growth of business 48
Nicknames and slang terms 49
Origin of the name Coke 50
Origin of the name Dope 50
How substitution was effected 52
Coca-Cola not an alcoholic beverage 53

I. COCA-COLA AS ORIGINALLY MADE 54
The trace of cocaine in Coca-Cola prior to 1900 56
The elimination of the cocaine 60

II. THE ADDED CAFFEINE DID NOT MAKE THE NAME A MISBRANDING 62
Caffeine is caffeine however derived 66
The Fig Syrup case distinguished 72

III. THE ADDITION OF THE CAFFEINE WAS NOT AN ADULTERATION OF THE SYRUP 81

IV. THE EARLY AND ABANDONED CLAIMS OF MEDICINAL QUALITIES FOR COCA-COLA 83
Exhibit Number 271 84
Wine of coca 86
"Truth about Coca-Cola" 86

V. THE RUCKER RECORD NOT COMPETENT EVIDENCE 90
The Rucker suit 91
Advertising after 1898 93
Use of cola nuts shown 99

VI. THE QUESTION OF CLEAN HANDS IS TO BE DETERMINED BY CONDITIONS WHEN THE SUIT WAS BROUGHT 102
Change of methods 105
Remote past does not govern the case 107

VII. COCA-COLA IS NOT A DECEPTIVE NAME OF THE BEVERAGE AS IT IS NOW MADE 114
The elimination of cocaine did not make the name deceptive 115
Effect on the name Coca-Cola of eliminating cocaine from the coca leaves used 116
The use of the word cola not misbranding .. 119
The defense rests on disparagement of petitioner's beverage 121
Taste and flavor 124
Coca-Cola is a distinctive beverage 127

VIII. THE NAME COCA-COLA IS A VALID TRADEMARK AT COMMON LAW 138
The name Coca-Cola has always identified petitioner and its beverage 142

IX. THE EFFECT OF THE REGISTRATION OF THE NAME COCA-COLA BY PETITIONER AS ITS TRADEMARK 145

TABLE OF CASES CITED.

PAGE

Baglin v. *Cusenier*, 221 U. S., 280.....31, 140, 145

Benedictus v. *Sullivan*, 12 R. P. C., 25.....29, 111

Broder v. *Zeno Mauvais Music Co.*, 88 F. R., 74.....29, 108

Burroughs, Wellcome & Co., 21 R. P. C., 217 (1904), 1 Chan., 736.....30, 138

California Fig Syrup Co. v. *Putnam*, 66 Fed., 750, 751.....

Canal Co. v. *Clark*, 13 Wall., 311, 323.....31, 141

Cleveland Stone Co. v. *Wallace*, 52 F. R., 431..28, 7

City of Carlsbad v. *Kutnow*, 71 F. R., 167....29, 95

Coca-Cola Co. v. *Henry A. Rucker*, 117 F. R., 1006, 125 F. R., 1004.....

Davids v. *Davids*, 1 T. M. Rep., 215; 233 U. S., 461.....28, 31, 79, 80, 145

Diamond Crystal Salt Co. v. *Worcester Salt Co.*, 221 F. R., 66.....30, 123

Eastman Photographic Materials Co. (1898), App. Cases, 571, 15 R. P. C., 476, 486.....30, 139

Elgin National Watch Co. v. *Illinois Watch Case Co.*, 179 U. S., 665.....30, 145

Employers Printers Club v. *Dr. Blosser Co.*, 122 Ga., 509, 69 L. R. A., 90.....29, 108

French Republic v. *Saratoga Vichy Co.*, 191 U. S., 427.....30, 145

Green Co. v. *Thomas, Executor,* 211 U. S., 598, 601 . . . . . 29, 97

Gaines, W. A. v. *Turner Looker Co.,* 204 F. R., 553 . . . . . 29, 113

Hanover Star Milling Co. v. *Metcalf,* 240 U. S., 403 . . . . . 31, 142

Jacobs v. *Beecham,* 221 U. S., 263 . . . . 28, 31, 78, 140

Johnson & Johnson v. *Seabury,* 69 N. J. Eq., 696; 61 Atl., 5 . . . . . 29, 112

Lawrence Mfg. Co. v. *Tennessee Mfg. Co.,* 138 U. S., 537, 546 . . . . . 30, 139

Luckenbach v. *McCahan, etc. Co.,* 248 U. S., 139 . . 41

McLean v. *Fleming,* 96 U. S., 245, 254 . . . . . 31, 141

Moxie Nerve Food Co. v. *Modox Co.,* 153 F. R., 487 . . . . . 29, 107

Pillsbury v. *Pillsbury-Washburn Co.,* 64 F. R., 841 . . . . . 29, 108

Peoria Gas & Elec. Co. v. *City of Peoria,* 200 U. S., 48 . . . . . 29, 110

Powell v. *Birmingham Vinegar Brewery Co.* (1897), A. C., 710, 14 R. P. C., 720, 727 . . . . 31, 140

Reddaway v. *Banham* (1896), A. C., 199, 13 R. P. C., 224 . . . . . 30, 140

Samuel Bros. & Co. v. *Hostetter Co.*, 118 F. R., 257, 260 12

Symonds v. *Jones*, 82 Me., 302; 19 Atl., 820. .29, 11

Thompson v. *Montgomery* (1891), A. C., 217, 6 R. P. C., 404, 8 R. P. C., 361, 365. . . . . 31, 14

Troll v. *Spencer*, 238 Mo., 102. . . . . 30, 11

U. S. v. *Antikamnia Co.*, 241 U. S., 265. . . . . 28, 7

U. S. v. *Coca-Cola Co.*, 241 U. S., 265. .26, 87, 115, 14

U. S. v. *Mayfield*, 177 Fed., 765. 5

Worden & Co. v. *California Fig Syrup Co.*, 187 U. S., 516. . . . . 26, 7

Wotherspoon v. *Currie*, L. R., 5 House of Lords, 508, 27 L. T. (N. S.), 393. . . . . 31, 14

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 362.

The Coca-Cola Company,

Petitioner,

vs.

The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas,

Respondents.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT, BRIEF AND ARGUMENT FOR THE PETITIONER.

STATEMENT.

This suit was instituted by the petitioner, The Coca-Cola Company, in the United States District Court for the District of Arizona to enjoin the infringement of a trade-mark and unfair methods of compe-

tition in the business to which the trade-mark is related, viz.: the manufacture and sale of a soda fountain and bottled beverage.

Petitioner's Case.

The Coca-Cola Company is the manufacturer and seller of the beverage Coca-Cola, and the original petitioner was a Georgia corporation organized in 1892. Pending this proceeding the Georgia corporation was succeeded by a Delaware corporation of the same name, which, by order of this court has been substituted as petitioner herein. This brief will proceed as if the Georgia corporation were still the petitioner.

Coca-Cola is a beverage made by adding carbonated water to an acidulated and flavored syrup—like all syrups composed largely of sugar and water and containing, among other flavorings, ingredients from cola nuts and coca leaves, and a small amount of caffeine, the stimulating element of tea and coffee.

The name Coca-Cola is registered as a trade-mark under the Acts of Congress of March 3, 1881, and February 20, 1905. These registrations are the property of the Coca-Cola Company, and are unrevoked and uncanceled.

The name Coca-Cola means and is universally un-

derstood to mean the product of the Coca-Cola Company and no other, and for more than thirty years, to the public, the word Coca-Cola has meant and designated exclusively the product of the petitioner. For convenience of reference we have collated the testimony on the several questions of fact involved in the case in Schedules I to IX. As to this proposition, we refer to Schedule I.

Coca-Cola has acquired, and is known through public application by, certain familiarly used abbreviations and nicknames. Those involved in the present case are the words, Coke, into which the name Coca-Cola is commonly abbreviated by many of the public, and Dope, which is a slang nickname for Coca-Cola in certain sections of the country. See Schedule II.

The words Coke and Dope have never been used by the Coca-Cola Company, and their application to Coca-Cola has not been on account of anything which it has done, but in spite of it and over its protest. Indeed, the Coca-Cola Company for years, in its advertisements, has besought the public to call for Coca-Cola by its full name and not to use nicknames, but such is the incorrigible habit of the American people to abbreviate and to use slang, that, notwithstanding the constant efforts of the Coca-Cola Company, the

name Coca-Cola is often abbreviated into Coke in some parts of the country, and with equal persistence the beverage is nicknamed Dope in others.

Petitioner's case is based upon the fraudulent use by respondents of these short and slang names for Coca-Cola, to pass off to the public a beverage they make as that made and sold by the petitioner. In addition to the use of the terms Coke and Dope the respondents resort to imitation of petitioner's labels and packages and suggestions to their customers to pass off respondents' beverage as and for Coca-Cola. The evidence relating to the identifying distinctiveness of the red Coca-Cola barrel and of the color of the product is collected in Schedules III and IV.

Respondents' Defense.

The respondents answer, denying the right and title of petitioner to the trade-mark Coca-Cola and even to the formula for making the beverage and *per contra* assert title in themselves to both. They deny infringement of trade-mark and unfair competition by denial of the acts charged against them and by denial that such acts constitute infringement or unfair competition. They allege that Coca-Cola is misbranded because the name and the label suggest the presence of coca and cola in the beverage when it contains nothing of either and that it is an al-

coholic beverage and injurious to health also because it contains caffeine as an added deleterious ingredient. The business of the petitioner they say is conducted in violation of the Food and Drugs Act, the Harrison Anti-Narcotic Act and the Anti-Trust Act. They say they are entitled to use the names Koke and Dope and that the petitioner is not entitled to use them, nor to protection against their use by others, because it has always repudiated both as names for its beverage.

The Evidence.

The originator of Coca-Cola was Dr. J. S. Pemberton, of Atlanta, Georgia, who began its manufacture and sale in a very small way in 1886. Pemberton conducted business as the Pemberton Chemical Company, and in addition to Coca-Cola sold a number of medicines, among them Pemberton's French Wine Coca, Gingerine, Orange Flower Cough Syrup, and Indian Queen Hair Dye. Up to March, 1887, there had been sold from 25 to 30 gallons of Coca-Cola syrup, and $73.96 had been spent in advertising. (Rec., 347 *et seq.*)

On July 8, 1887, Pemberton sold a two-thirds interest in the Coca-Cola business, and on April 14, 1888, he sold the remaining one-third to persons whose rights were acquired, with the two-thirds interest previously sold, by the Coca-Cola Company upon its organization in 1892.

J. C. MAYFIELD.

In order to see the question, which this record presents, in proper perspective, it is necessary to trace the history of J. C. Mayfield, the originator of and sponsor for respondents. When Pemberton sold the Coca-Cola business to petitioner's predecessors, he retained his medicine business, and on January 14, 1888, he and three other men, Murphy, Bloodworth and J. C. Mayfield, organized the Pemberton Medicine Company. (Rec., 1287.) Pemberton announced to his associates that he had sold the Coca-Cola business, and a quarrel ensued. Murphy states (Rec., 1289) that, confronted with this emergency they set about to devise means to keep the Coca-Cola business by indirection, notwithstanding its previous sale. As a means to this end Pemberton offered to get up for them "a substitute which would be identically the same thing under a different name." (Rec., 1283.)

The J. C. Mayfield who was associated with Pemberton in the Pemberton Medicine Company in 1888, is the same person who in 1911 organized the respondent companies.

From the beginning he has been trying to find out how Coca-Cola is made. He testified in this case that Dr. Pemberton disclosed to him the Coca-Cola formula in January, 1888 (Rec., 1654), but on June 18, 1899, he wrote a letter to an associate from which it is evident that he did not know the formula, was

trying in every surreptitious way to learn it, and was piecing together information from all manner of sources, for there he says:

> "I got that from the negro that worked for the Coca-Cola Company. * * * Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta."

And again, in the same letter:

> "We have now the original formula, and Coca-Cola exactly. * * * I am tickled to death at being able to get back to the original formula and make it identical 'Coca-Cola.'"

In 1893 Mayfield put upon the market a drink which was called Celery-Cola, the formula for which had been worked out by Pemberton. Later he left Atlanta and went to Birmingham, Alabama, where he bought an interest in the Schoolar Vinegar Company and continued to make Celery-Cola in connection with dealings in vinegar, hop-jack or prohibition beer, and wine to be sold as cider and sherbet, in dry territory. He organized a corporation at Birmingham called the Celery-Cola Company, and was also interested in a company there, called the J. C. Mayfield Manufacturing Company. There was an interval when Mayfield was in Boston in 1898, and his wife and Brown, then her husband, and S. T. Mayfield, a son, were manufacturing Celery-Cola in Jersey City. There was also a time when Mayfield was making Celery-Cola in Nashville, Tennessee, when he was devoting most of his attention to oil schemes.

There was a plant established in St. Louis where Celery-Cola was made. Celery-Cola, possibly drinks called Wine Coca, Pepsi-Nola, Pepo-Aid, Vigo and Soda Pop, were all the soft drinks which Mayfield, or any of the companies in which he was interested, had made up to 1909. Celery-Cola was the principal drink, the others seem to have been ephemeral. Indeed, there is a letter in the record written by Mayfield in 1905 (Rebuttal Exhibit 12) in which he says: "Celery-Cola is my all."

The Government prosecuted Mayfield and his associates concerning Celery-Cola (*U. S.* v. *Mayfield*, 177 Fed., 765), and upon conviction of violation of the Food and Drugs Act, the affairs of the Celery-Cola Company were wound up, the formula of Celery-Cola was changed and Mayfield went to Shreveport, Louisiana, where he organized the Koke Company, Limited, in the fall of 1910, having, in September, 1909, first put out the revised Celery-Cola under the name Koke.

Mayfield was told by a traveling man that Christy & Huggins, of Murfreesboro, Tennessee, were making a drink called Koke. He went to Murfreesboro. Upon inquiry he found that Christy & Huggins had registered the word Koke as a trade-mark, in the Patent Office. Mayfield bought this registration. He did not take over any business. Christy & Huggins testified in this case that they adopted the name Koke

and used it on an imitation of Coca-Cola, because they knew that the name Coca-Cola was abbreviated into Coke. (Rec., Vol. V, p. 2006.)

The use of the name Koke, however, was not enough to enable respondents to get all the Coca-Cola business that they coveted, because in certain sections of the country the abbreviated name is transformed by a slang-loving public into Dope.

Mayfield, discovering that Houppert & Worcester (Rec., 1363, 1365, 1370, 1372, 1392, 1399), bottlers, of Birmingham, Alabama, had registered the word "Dope" in the Patent Office, went to Birmingham and bought this registration.

A man named W. McCarty Moore, who was a mining promoter, had long entertained the idea of competing with the Coca-Cola Company. (Rec., 1751.) He heard of Mayfield and that Mayfield claimed to have been a partner in the Coca-Cola business and had been trying to compete with the Coca-Cola Company under various names for years. (Rec., 1738.)

Moore admits that he knew that people abbreviated the name Coca-Cola into Coke. (Rec., 1753.) He sought the advice of counsel, whether, notwithstanding this, the name Koke could be used. (Rec., 1754.)

> "I presume," he testified, "the question was discussed at the interview we had with counsel, that Koke was used by the public as an abbreviation for Coca-Cola. I am pretty sure we discussed mighty nearly everything that was possi-

> ble to discuss regarding it. I know I went carefully into it and discussed every possible phase of it. * * * I was advised that Koke had been registered and that registration gave us the exclusive right."

Moore thereupon took a Coca-Cola label to a printer as copy for the proposed Koke label. (Rec. 1753.)

Moore also interested certain people at New Orleans in the project, among them a man named James L. Wright, who became vice president of respondent Southern Koke Company, Ltd. (Rec., 1514.)

> "My understanding," he said, "of the adoption of the word Koke was that there were frequent demands, or calls rather, on the part of buyers of the various soft drinks for Koke or Dope, and similar terms, and that the word Koke was adopted to take advantage of that demand. That was my understanding of the adoption of the word. I was told that the word had been copyrighted by a manufacturer of a similar soft drink in Tennessee or Kentucky, up there somewhere, and this copyright on the name was purchased by Mr. Mayfield or his associates."

When the manufacture of Koke was about to be started in New Orleans, cuts of the labels which Moore had copied from the Coca-Cola labels were sent over from Dallas, and a call was made by Scott and Cheevers, vice president and salesman, respectively, of the respondent, Southern Koke Company

Ltd., on the Houser Printing Company for the purpose of having the labels printed. There was a dispute about the color of the Coca-Cola label. Cheevers went out, and brought back a bottle of Coca-Cola with a label on it, so that they might be sure to have an exact duplicate of it in color. (Rec., 588, 639.) How successful was this attempt is shown by the result.

Coca-Cola is invariably shipped in distinctive red barrels. (Schedule IV.) Respondents instructed a paint maker to get for their barrels a shade of red as near the Coca-Cola red as possible. Shipments of paint were returned by respondents to the Sherwin-Williams Company at New Orleans as not the exact shade. (Rec., 577, 641.) Second-hand Coca-Cola barrels were systematically purchased, to be used as containers for respondents' syrup. (Rec., 678.)

So much for the purpose of respondents' organizers and some of the acts which reflect it. The imitation of labels and barrels, while shedding much light on their scarcely concealed purpose, and significant in themselves, are subordinate to the principal act of unfair trading in which respondents indulged.

In 1911 Moore and Mayfield organized the various Koke Companies, respondents. Mayfield turned in an alleged secret formula for the manufacture of the product, and the Murfreesboro registration of the word Koke, which he had previously bought. In the preliminary contracts the alleged right of the respondents to the name Koke is based on this registration. The registration of the word Dope was a later purchase. Thus equipped the respondents began business.

The product sold by respondents, whether sold

under the name Koke or Dope, is the same, the name alone differing. In districts where the name Coca-Cola is abbreviated into Coke, respondents' product is sold as Koke. In districts where the word or abbreviation Coke is supplanted by the slang term Dope, respondents' product is sold as Dope. The two names appear concurrently upon respondents labels and upon the business cards of their representatives.

The registrations in the Patent Office of the words Koke and Dope which Mayfield purchased, are effective instruments in the scheme of fraud.

The business card presented to dealers is as follows:

TRADE KOKE COMPANY OF AMERICA MARK

UNITED STATES, MEXICO, CUBA AND CANADA
SUBSIDIARY OFFICES
CHICAGO, ST LOUIS, CHATTANOOGA, DALLAS, LOS ANGELES, NEW ORLEANS, WASHINGTON AND NEW YORK

REG. U.S. PAT. OFF. JUNE 1, 1907. NO 63,038
KOKE & Dope
ARE NON-ALCOHOLIC AND HAVE NO HARMFUL EFFECT

TICE!

Our customers will please notify US, or the INDUSTRIAL SURETY CO. of NEW YORK ny infringements on our trade-marks "KOKE" or "DOPE," or of any one substituting any other erage on calls for "KOKE" or "DOPE." This is a violation of the Federal laws, and we will ecute any and all persons who thus infringe upon our rights, to the fullest extent of the law.

KOKE COMPANY OF AMERICA
J. C. MAYFIELD, President

ENTED BY

J. W. MAYFIELD
REPRESENTING THE NEW ORLEANS OFFICE

[OVER]

Similar warnings and threats appear in respondents' advertisements in trade papers to deal-

ers. For example, in an advertisement in the Southern Carbonator and Bottler the statement occurs, "Keep Your Conscience Clear. We have the sole right to sell 'Koke' or 'Dope' and are protected in the use of these names by United States trade-mark registrations as shown above." (Rec., 1686.)

Mayfield describes respondents' beverage as "the legalized drink." (Rec., 1687.)

The use which is made of the registrations of Koke and Dope is described by a very large number of witnesses. The dealer was appealed to through his cupidity and his fear. Respondents' salesmen systematically stated that when customers asked for Coca-Cola under a nickname or abbreviation, their product Koke could be served; that no one could tell the difference; that there would be more money in it and that the customer would be given exactly what he had asked for. If the dealer hesitated at this proposal to defraud his patrons, respondents' representatives asserted that the words Koke and Dope were their registered trade-marks, and that to sell anything else in response to requests for Koke or Dope was a violation of the federal law and ground for prosecution.

Substitution for Coca-Cola was thus not only suggested and invited, but announced to be legitimate.

legally unassailable, and licensed; indeed, compelled under penalty by the federal government.

Stock in the respondent companies was attempted to be sold on the representation that the product of the Koke Companies could be passed off as and for Coca-Cola.

This conduct of respondents' salesmen, the suggestions to dealers that Koke can be successfully palmed off as Coca-Cola and the attempted sale of stock are not denied. The salesmen who made them were named (Patton, Boyd and others) and though still in respondents' employ, were not called by them as witnesses. See Schedule V.

The natural and inevitable result has followed. Respondents' syrup is sold as and for Coca-Cola and the public is deceived. See Schedule VI.

There is no dispute about these facts. Many of them are admitted by respondents' officers. None is denied. Indeed, the positions assumed by respondents in these cases, if carried out in practice (and the record shows that they are), necessitate the passing off of respondents' syrup for Coca-Cola, and further, that such passing off is not only legitimate, but not to pass off is illegal. Respondents' salesmen represent to prospective purchasers that their syrup is the same as Coca-Cola, made according to the same

formula, that no one can tell them apart, that by virtue of the registrations, respondents are entitled, under the laws of the United States, to the exclusive use of the words Koke and Dope, and that anyone who sells Coca-Cola or anything else in response to requests for Koke or Dope is guilty of unfair trading and violation of the federal trade-mark statutes. Respondents' syrup is sold at a cheaper price than Coca-Cola, thus appealing to the greed of the dealer, as the previous arguments appeal to his timidity or dishonesty.

The record shows that respondents' salesmen systematically and continually offer these suggestions to intending purchasers. Advertisements in bottlers' trade papers and cards of representatives carry all of these assertions in positive terms. The uniformity of the salesmen's representations coinciding, as they do, exactly with respondents' trade paper announcements, and their contentions in this and the other cases pending against them, shows that the plan above outlined is the concerted scheme according to which their business is conducted.

The defense first urged was that the word Koke was adopted and has been continuously used by Mayfield since 1888. On this basis the claim was made of prior right. It was shown that this defense was

fabricated. It was so found by the District Court, and inferentially by the Circuit Court of Appeals. The tribunal of the Patent Office, first to consider this defense, characterized the conduct of J. C. Mayfield, who asserted it as "alone sufficient to warrant the conclusion that his testimony cannot be relied upon," and stated "that he apparently attached no importance to the fact that he was testifying under oath."

There is no use in dilating upon the conditions which this record discloses in this respect. The testimony upon which the courts came to the conclusion that this defense is pure invention is collated in Schedule VIII.

Then, notwithstanding the purchase of the registrations of the words Koke and Dope by the respondent companies, and the representations to the trade that these words are their exclusive property, without regard to consistency or candor, it was contended that these words were generic terms applied to all drinks like Coca-Cola. The names which respondents claimed as their exclusive property, to avoid the consequences of their acts, they asserted to be public property.

This defense in detail is discussed in Schedule IX.

Finally the respondents say that the business they

seek to appropriate is so unclean that the petitioner has no rights which anybody is bound to respect or which a court of equity should protect. In the language of Mr. Justice Holmes that it is *caput lupinum* and may be carried off by anyone at will.

The evidence relative to the defense of unclean we will consider in the course of the argument upon that question.

Near the close of the trial, just before the respondents called their last witness in surrebuttal, they offered in evidence the transcript on appeal of the Rucker case and respecting this the record in this case is as follows:

> "Exemplified copy of the transcript in the case of *Coca-Cola Company* v. *Henry A. Rucker* offered by Mr. Littleton (counsel for defendants) but on objection by counsel for plaintiff objection was sustained by the court, to which ruling Mr. Littleton took an exception." (Rec., Vol. 6, p. 2501.)

The Rucker suit was one brought by the Coca-Cola Company in 1900 to recover taxes paid by the company under the Spanish War Revenue Act of 1898.

The purpose of introducing this record was not announced, neither was any particular portion of the record pointed out as desired. It was offered

en bloc and *en bloc* was excluded. It was not transcribed and made a part of the testimony in the transcript for the Court of Appeals, but was taken by defendants to that court as a physical object, as a bottle or tin can might have been. No assignment of error was predicated upon its exclusion, yet in the briefs of respondents in that court it was quoted and used quite as much as the direct, original testimony in the case.

The District Court in its

OPINION,

among other things said:

"It is insisted by the defendants that the words Coca-Cola are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trade-mark. This contention was considered in the case of *Coca-Cola Company* v. *Nashville Syrup Company*, 215 Fed. 527, and was there decided adversely to such contention. I think that decision is decisive of the question."

"The question of the validity of the trade-mark 'Coca-Cola' and the right of plaintiff to its exclusive use since its registration under the Act of Congress of February 20, 1905, would seem to be placed beyond the pale of contention by the case of *Coca-Cola Company* v. *Deacon Brown Bottling Company*, 200 Fed. 105.

I find as a matter of fact from the evidence

that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendants, Koke Company of America and its predecessors, did not adopt or make use of the name 'Koke' until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff."

* * * * *

"I am convinced that when the witness Mayfield adopted the name 'Koke,' he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company. I further find that the purchase of the trade-mark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness."

* * * * *

"The witness Wright of the Southern Koke Company justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola."

The District Court accordingly entered a

DECREE.

"(1) That the court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word 'Coca-Cola' is a valid trade-mark.

(3) That plaintiff is the owner of and alone entitled to use the trade-mark 'Coca-Cola' and that its goods alone can lawfully be sold under that name.

(4) That the words 'Koke' and 'Dope' are

each an abbreviation of the word 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product 'Coca-Cola.'

(5) That the defendant, The Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name 'Koke' until the year 1909 and that they had and have no right to its use.

(6) That defendants and their predecessors have no interest in or claim to the trade-mark 'Coca-Cola,' the 'Coca-Cola' business or formula, and the defendants and their predecessors' claim of interest in the 'Coca-Cola' business, the trade-mark 'Coca-Cola' and knowledge of the 'Coca-Cola' formula are without foundation.

(7) That the words 'Koke' and 'Dope' were adopted and used by the defendants and their predecessors with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' product under the names 'Koke' and 'Dope' as and for 'Coca-Cola.'

(9) That the defendants and each of them have infringed the plaintiff's trade-mark, and have been guilty of unfair competition with the plaintiff."

An injunction was issued pursuant to the terms of the decree and an accounting ordered.

On appeal of the case the respondents filed thirty-six assignments of error covering thirty-eight printed pages. (Rec., Vol. I, pp. 250-288.)

These many assignments of error present for consideration the various defenses made by the answer.

The Circuit Court of Appeals decided adversely to petitioner, reversing the decision of the District Court and directing a dismissal of the bill.

OPINION OF THE CIRCUIT COURT OF APPEALS.

The court delivered an opinion in which it said:

"A very large amount of testimony was taken in the case, from which the court below found as a fact that the preparation manufactured and sold by the defendants to the suit was in imitation of that of the complainant, and that the name under which it was so manufactured and sold—'Koke'—was selected for the purpose of reaping the benefit of the reputation and advertising of the complainant and because it would permit the defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of the complainant was copied and imitated, and the barrels in which defendants' products were shipped were colored as nearly like those of complainant as possible. Upon the record we would not be justified in holding that the trial court reached the wrong conclusion in that respect, and if that were the

only point in the case would readily affirm the interlocutory decree appealed from."

But the court said further:

"The evidence, we think, leaves no room for doubt that the appellee's very extensive business conducted under the name Coca-Cola is not entitled to protection at the hands of a court of equity; first, because it shows that in the beginning, and for many years thereafter, the coca of which its compound was in large part made contained the deadly drug cocaine, and the caffeine, which constituted the other main ingredient, was derived mainly, and indeed, almost exclusively, not from cola nuts, but from tea leaves. Yet the labels with which the preparation was adorned contained pictures of coca leaves and cola nuts, and was widely advertised and sold first, under the name of 'Coca-Cola Syrup and Extract,' next as 'Coca-Cola Syrup,' and finally as 'Coca-Cola,' as a 'Valuable brain tonic,' as an 'ideal nerve tonic and stimulant,' as a cure of 'headache, neuralgia, hysteria, and melancholy' and 'of nervous afflictions,' under which representations a tremendous consumption was built up, and under which large numbers of the appellee's customers still consume the mixture, although long prior to the bringing of the present suit the drug cocaine was practically eliminated from the drink, and the caffeine, of which it has since been mainly composed, still comes mainly, if not entirely, from other sources than the cola nut. We find such

conduct on the part of the appellee to be, in fact, such deceptive, false, fraudulent and unconscionable conduct as precludes a court of equity from affording it any relief."

Upon the rulings and decision of the Court of Appeals, the petitioner assigned error as follows:

ASSIGNMENT OF ERRORS.

"1. The court erred in holding that because in the beginning there was cocaine in the beverage Coca-Cola as made by petitioner, although that had not been the case for years before this suit was brought, the petitioner was not entitled to the protection of a court of equity.

2. The court erred in holding that a misbranding resulted from decocainizing the coca used in making the beverage when the word coca was continued in the name of the beverage and the emblem of the coca leaf was continued on the labels.

3. The court erred in holding that because years before this suit was brought, Coca-Cola was advertised as a medicine by petitioner, notwithstanding such advertisement had long and for years been discontinued, the petitioner was not entitled to relief in equity.

4. The court erred in holding that a misbranding resulted from the use of the word cola because the caffeine used in making Coca-Cola was derived mainly of tea leaves and not from cola nuts, although cola nuts are used in making the beverage.

5. The court erred in not affirming the decree of the District Court.

6. The court erred in holding that the petitioner did not come into equity with clean hands.

7. The court erred in holding that the business of the petitioner conducted under the name Coca-Cola was not entitled to the protection of a court of equity.

8. The court erred in refusing relief to petitioner because of 'Deceptive, false, fraudulent and unconscionable conduct' by petitioner when all conduct so characterized by the court had in fact ceased and it was so found by the court, long and for years prior to the bringing of this suit and prior to the acts of respondent complained of.

9. The court erred in finding that petitioner's conduct was 'such deceptive, false, fraudulent and unconscionable conduct' as precludes a court of equity from affording any relief.

10. The court erred in construing and applying the opinions of this court in *U. S.* v. *Coca-Cola Company*, 241 U. S. 265, and in *Worden & Co.* v. *California Fig Syrup Co.*, 187 U. S. 516, and each thereof as requiring its foregoing conclusions.

11. The court erred in not holding the final determination of the *Coca-Cola Company* v. *the Koke Company of America, res judicata* of the present case and in failing to affirm on the filing of the petition in which such final determination was called to its attention.

12. The court erred in ordering the bill dismissed absolutely.

13. The court erred in considering as the basis for conclusions of fact, evidence excluded and not in the record and in failing to consider evidence properly in the record.

14. The court's conclusion is contrary to the law and the evidence."

THE PROPOSITIONS AND AUTHORITIES.

The propositions presented by the assignments of error made in the petition for certiorari are:

I.

COCAINE IN THE PROPORTION IN WHICH IT WAS FOUND ORIGINALLY IN COCA-COLA DID NOT RENDER THE BEVERAGE A NOXIOUS ONE.

II.

THE ADDITION TO COCA-COLA SYRUP, OF CAFFEINE DERIVED FROM SOURCES OTHER THAN THE COLA NUT DID NOT MAKE THE NAME COCA-COLA A MISBRANDING.

United States v. *Antikammia Co.*, 231 U. S., 654.

Cleveland Stone Co. v. *Wallace*, 52 Fed. Rep., 431.

Jacobs v. *Beecham*, 221 U. S., 263.

Thaddeus Davids v. *Davids*, 1 T. M. Rep., 215; 233 U. S., 461.

III.

THE ADDITION OF CAFFEINE TO THE SYRUP WAS NOT AN ADULTERATION OF IT, BECAUSE IT DID NOT MAKE THE BEVERAGE INJURIOUS OR DELETERIOUS TO HEALTH.

IV.

THE CLAIMS OF MEDICINAL QUALITIES FOR THE BEVERAGE MADE IN THE EARLY LABELS AND ADVERTISEMENTS, DID NOT VITIATE THE TRADE-MARK OR PRECLUDE IT FROM PROTECTION AGAINST UNFAIR COMPETITION, THOSE CLAIMS NOT BEING IN ANY MATERIAL SENSE FALSE OR MISLEADING.

V.

THE RECORD IN THE RUCKER SUIT IS NOT COMPETENT TESTIMONY IN THIS CASE.

City of Carlsbad v. *Kutnow*, 71 F. R., 167.

Green County v. *Thomas, Executor*, 211 U. S., 598.

VI.

COCAINE WAS ELIMINATED FROM THE BEVERAGE AND THE EARLY CLAIMS OF MEDICINAL VIRTUES WERE ABANDONED MANY YEARS BEFORE THIS SUIT WAS INSTITUTED. THE REQUIREMENT OF "CLEAN HANDS" AS A CONDITION OF EQUITABLE RELIEF IS MET IN THIS CASE BY THE CONDITIONS AS THEY EXISTED WHEN THIS SUIT WAS BROUGHT AND AS THEY HAD BEEN ESTABLISHED BY THE PETITIONER FOR MANY YEARS BEFORE.

Moxie Nerve Food Co. v. *Modox Co.*, 153 F. R., 487.

Pillsbury v. *Pillsbury-Washburn Company*, 64 F. R., 841.

Broder v. *Zeno Mauvais Music Co.*, 88 F. R., 74.

Employers Printers Club v. *Dr. Blosser Co.*, 122 Ga., 509, 69 L. R. A., 90.

Peoria Gas & Electric Co. v. *City of Peoria*, 200 U. S., 48.

Benedictus v. *Sullivan*, 12 R. P. C., 25.

Symonds v. *Jones*, 82 Me., 302; 19 Atl., 820.

Johnson & Johnson v. *Seabury*, 69 N. J. Eq., 696; 61 Atl., 5.

W. A. Gaines v. *Turner-Looker Co.*, 204 F. R., 553.

Diamond Crystal Salt Co. v. *Worcester Salt Co.*, 221 F. R., 66.

Troll v. *Spencer*, 238 Mo., 102.

VII.

COCA-COLA IS NOT A DECEPTIVE NAME OF THE BEVERAGE AS IT IS NOW MADE AND HAS BEEN MADE FOR MANY YEARS PRIOR TO THE BRINGING OF THIS SUIT. ALTHOUGH COCAINE HAS FOR YEARS BEEN ELIMINATED, COCA LEAVES, DECOCAINIZED, AND COLA NUTS ARE USED IN THE MANUFACTURE AND ARE ELEMENTS GIVING FLAVOR AND CHARACTER TO THE BEVERAGE.

VIII.

THE NAME COCA-COLA IS A VALID TRADE-MARK, ACQUIRED BY PRIORITY OF ADOPTION AND USE BY PETITIONER'S PREDECESSORS, BECAUSE ORIGINALLY A NOVEL, UNUSUAL AND ALLITERATIVE EXPRESSION WHICH BY ASSOCIATION AND EXTENSIVE USE, IN FACT IDENTIFIES THE PRODUCT OF PETITIONER EXCLUSIVELY AND BECAUSE WHATEVER SUGGESTION OF INGREDIENTS THE NAME CONVEYS, IS TRUTHFUL.

In re Burroughs, Wellcome & Co., 21 R. P. C., 217. (1904), 1 Ch., 736.

In re Eastman Photographic Materials Co. (1898), App. Cases 571, 15 R. P. C., 476, 486.

Lawrence Mfg. Co. v. *Tennessee Mfg. Co.*, 138 U. S., 537, p. 546.

Reddaway v. *Banham* (1896), A. C. 199, 13 R. P. C., 224.

Elgin National Watch Company v. *Illinois Watch Case Company*, 179 U. S., 665.

French Republic v. *Saratoga Vichy Co.*, 191 U. S., 427, 435.

Powell v. *Birmingham Vinegar Brewery Co.* (1897), A. C. 710, 14 R. P. C., 720, 727.
Thompson v. *Montgomery* (1891), A. C. 217, 6 R. P. C., 404, 8 R. P. C., 361, 365.
Wotherspoon v. *Currie,* L. R., 5 House of Lords, 508, 27 L. T. (N. S.), 393.
Baglin v. *Cusenier,* 221 U. S., 580.
Jacobs v. *Beecham,* 221 U. S., 263.
McLean v. *Fleming,* 96 U. S., 245, 254.
Canal Co. v. *Clark,* 13 Wall., 311, 323.
Hanover Star Milling Company v. *Metcalf,* 240 U. S., 403.

IX.

THE PETITIONER'S OWNERSHIP IN THE TRADE-MARK COCA-COLA ACQUIRED BY PRIORITY OF ADOPTION AND USE AND CONTINUOUS ASSOCIATION WITH PETITIONER'S PRODUCT, HAS BEEN CONFIRMED BY REGISTRATION IN THE PATENT OFFICE UNDER THE ACTS OF CONGRESS OF MARCH 3, 1881 AND OF FEBRUARY 20, 1905.

Thaddeus Davids Company v. *Davids,* 233 U. S., 461.
Baglin v. *Cusenier,* 221 U. S., 580.

THE ARGUMENT.

J. S. Pemberton of Atlanta, Georgia, was a doctor and a druggist who devoted himself principally to the making of proprietary articles, medicines, hair dyes, cosmetics and beverages. In the year 1886, he formed with three other persons of whom F. M. Robinson was one, a corporation under the laws of Georgia, styled the Pemberton Chemical Company. He transferred to the company the right to several preparations among which were "French Wine of Coca," a medicine sold at a dollar a bottle, "Gingerine," the precise nature of which is not disclosed, "Indian Queen Hair Dye" and "Globe Flower Cough Syrup." At the same time he was experimenting on other drinks and chemical combinations. (Rec., Vol. I, p. 347.)

The Origin of Coca-Cola.

In May, 1886, they began making Coca-Cola, and it was placed upon the market and sold. But it was a day of small beginnings and everything was done on a small scale. The Wine of Coca was a medicine and was sold as such, but Coca-Cola was intended to be a soda fountain beverage. They experimented with it and tried it out at a soda fountain and after various changes in the compound, it seemed to be

satisfactory. The beverage was designed to be a distinctive one, having some medicinal virtues, but it was to be a refreshing drink rather than a medicament. Its dominant ingredient was simple syrup, which made up more than 95 per cent of its volume. In addition to this there was some phosphoric acid, glycerine, flavoring oils, coca leaves and cola nuts and some added pure caffeine.

The most potent alkaloid in coca leaves is cocaine, of which the leaves contain about one-half of one per cent of their own weight.

The most potent element in the cola nuts is caffeine, which, as is well known, is the stimulant of tea and coffee. The caffeine contained in the cola nuts used in making Coca-Cola was not sufficient for the purposes of the beverage, and, therefore the pure caffeine was added to an amount approximating the amount present in tea or coffee.

> "Of course, if enough of the extract of cola could be used, undoubtedly enough caffeine could be supplied by that means, but it is admitted that it would not be practicable to supply it that way, because of the enormous quantity of the extract that would have to be used." (Respondent's brief in Court of Appeals, p. 176.)

If only the caffeine were desired from the cola nuts, it would not be necessary to use the cola nuts

at all. And so as to the cocaine. If only that were desired from the coca leaf, if would not be necessary to use the leaf at all. It would be more convenient in every way to buy the cocaine and the caffeine. But instead of using these elements exclusively, Dr. Pemberton and his successors used coca leaves and added no cocaine, and used cola nuts and added comparatively a great deal of caffeine, because more caffeine was wanted.

There was no reason for using the crude coca leaf and the crude cola nut except that the qualities of the leaf, other than the cocaine, and the qualities of the nut, other than the caffeine, helped to make the beverage what it was, something of distinctive taste, flavor and quality. And the formula as made by Dr. Pemberton and used by him and his successors has been justified by the results. The enormous increase of consumption from twenty-five gallons in 1886 to about seven millions of gallons in 1913 is due in part to the volume of advertising done, but advertising could only call general attention to the beverage, it could not make it pleasing to the palate, it could not compel the public to drink it.

It was insisted in argument in the courts below, and no doubt will be insisted here, that the coca leaf, as leaf, and the cola nut, as nut, were used only as a pretext to justify the name Coca-Cola, that the only

thing wanted of the coca leaf was the cocaine in it, and the only thing desired, and to be found in the cola nut was the caffeine, but for this there is no warrant in the evidence.

The Origin of the Name.

How the name came to be applied, is told by the witness Robinson and there is no question of the simple, probable and natural story told by him. He says (Rec., Vol. I, pp. 348 and 349):

> "We commenced making what we called Coca-Cola in May, 1886. I was assisting in the manufacture of 'Coca-Cola' and in putting it on the market and selling it. Well, they continued in business, I suppose, a year—I do not remember definitely, I could find out perhaps—after that, selling these various preparations, including, after May, 1886, 'Coca-Cola.' This product had no name in the beginning, it was being experimented upon. Mr. Pemberton compounded a preparation, it was taken down to Mr. Venable's soda-fountain for the purpose of trying it to ascertain whether it was something the people would like or not, and, after they had made various changes in the compound, it seemed to be satisfactory and then the question came up with reference to having a name for it. There were four of us in the corporation and they agreed to submit four names, each one of the members submitting a name. I submitted the name 'Coca-Cola' and it was afterwards

adopted and used. At that time we were doing a small business in everything. The purpose of this drink 'Coca-Cola' was to use it at soda fountains as a beverage."

On cross-examination he was asked as to his testimony in an interference proceeding in the Patent Office at Washington in 1892, and he says (Rec., Vol. I, pp. 354 and 355):

"Yes, sir, I testified in an interference proceeding in the Patent Office in Washington in 1892 in an interference between a man named Kent and another named Beerman and the Coca-Cola Company, and in that proceeding I testified that I originated the word 'Coca-Cola.' I do not remember that I stated the reasons why I gave it that name.

Q. 19. Well to refresh your recollection, I will ask you whether or not you were asked these questions and answered as follows: '(Q) Do you know the origin of the word "Coca-Cola" as applied to a tonic beverage? (A) Yes. (Q) What is it? (A) I was the originator of the word. The syrup was given this name on account of the extracts which it contained, "coca" and "cola" made from coca leaves and from the cola-nut.' Did you testify that?

A. I expect I did.

Yes, that is true as far as it goes. It only explains in part the object in giving its name,—it was simply to give it a name to be advertised by and to be called for, and the word 'Coca-Cola'

don't explain what there was in it. I know what the compound is and was. It is true that might have been one reason why the name suggested itself to me, was because of the fact that there was in it the properties of 'coca' leaves and of 'cola' nuts and that may have been one reason why it was given that name; but the object in giving it its name was to have a name to be advertised by, and called for, and things of that kind, and not a description of the contents—there was dozens of other things that went into it that don't appear in the name. I don't deny now that I swore in this Washington proceeding in the Patent Office that I gave it its name on account of the extracts that went in it, do I? I am giving you additional reasons why the name was given to it."

Undoubtedly when the name was suggested the alliteration and the assonance commended it to all. There could be nothing better. But it was the natural order of things, as Mr. Robinson testifies, first, to get the beverage and then to get the name. First the formula and then the christening of it. The experiment and endeavor was for a distinctive beverage. There was no popular name, existing and outstanding into which this beverage was to be fitted. "Coca-Cola" was not to be found in the dictionary, nor was it current in commerce. They made a distinctive beverage and they bestowed upon it a distinctive name.

This beverage was made in part, not simply of cocaine and caffeine, the active elements of the coca leaf and the cola nut, but it was made in part of the crude coca leaf and the crude cola nut. They wanted the herbs just as our forebears wanted the herbs, sage and catnip and sassafras, and not simply the alkaloids in them (of which they knew nothing), for the household beverages they brewed. There was no occasion in the beginning of this business, for the subtlety now suggested that the crude herbs were put in not as constituents of the beverage, but simply to justify the name, the coca leaf to justify the word coca and the cola nut to justify the word cola.

It was not necessary for that purpose to use the coca leaf at all. The use of pure cocaine would justify the word coca. Neither would it be necessary to use any cola nuts, albeit they used caffeine in pure form, provided the caffeine was obtained from cola nuts. But in making this beverage they added pure caffeine to that contained in the cola nuts, which added caffeine was not obtained from cola nuts, but was in every respect identical with and indistinguishable from that so obtained. So far as caffeine was concerned the amount contained in the cola nuts used, was practically if not altogether negligible, and if not it was much more convenient to add a touch

more of pure caffeine, than to extract it from crude cola nuts.

Did these four men, striving to get a beverage they could market, in the first year of their endeavor, during which they succeeded in selling twenty-five gallons of their product, first find a name as being the thing of greatest value, and then select ingredients for the beverage not to make a good formula but to justify a good name?

The testimony, and the only testimony in the case as to this, is the other way. They found by practical tests and experiments, a satisfactory formula and this formula was a suggestion of the name to be applied. They used coca leaves and cola nuts in the formula, this is not disputed, and these were apparently new elements in a soda-fountain beverage. The sugar and water were everything in weight and volume, but they were given no place in the trade-mark. The name was not to be a recipe or formula reciting everything that entered as an element into the composition, and so they took the names of the herbs which came as a new use into such a beverage, the coca leaf and the cola nut, not simply their most potent elements, cocaine and caffeine.

It is altogether too much to say that Dr. Pemberton and his associates anticipated the end from the

beginning, that they foresaw the great expansion of the business and the aggressions upon its good will—and then with a full knowledge of trade-mark law, used coca leaves and cola nuts in making the beverage, not because they added to or affected its quality, but simply as an excuse for adopting what they regarded as an attractive name. This is to credit them with great foresight and with very little wisdom in turning that foresight to account.

The simple truth as shown by the testimony is that they used cola nuts in crude form as an element of the beverage. But they wanted more caffeine, and since caffeine was caffeine, and was nothing different or more or less, from whatever source obtained, they bought it in the general market, heedless and no doubt ignorant of the source from which it came.

The Petitioner's Title.

After the Pemberton Chemical Company had been in operation for a few months, the doctor announced to his associates that he had transferred "Wine of Coca" and some other preparations to the corporation, but not Coca-Cola. He had secured, he said, a trade-mark on this in his own name and had sold this together with the formula and business to Messrs. Lowndes and Venable.

The associates at first objected to this, but at last

acquiesced. It was not then a matter of great importance. The business at the time was a small one, and its future uncertain.

From Dr. Pemberton, through Messrs. Lowndes and Venable and their successors, the petitioner derives its title. The details as to this are shown by the testimony of Asa G. Candler (Rec., 372 *et seq.*) and that of W. E. Venable (Rec., 388 *et seq.*). The lower courts by necessary implication found this issue in favor of the petitioner and their finding will be accepted by this court "unless shown to be clearly erroneous."

Luckenbach v. *McCahan, etc., Co.*, 248 U. S., 139.

RESPONDENTS' CLAIM OF TITLE.

There is in the defense a claim of title by the respondents, but it is not seriously insisted upon. In the thirteenth assignment of error made by them in the Circuit Court of Appeals, which is upon the finding of the District Court that their claim and that of their predecessors "of interest in the Coca-Cola business, in the trade-mark Coca-Cola, and knowledge of the Coca-Cola formula are without foundation," they say that this finding was error "because neither the defendants nor their predecessors have claimed any interest in the trade-mark

or the Coca-Cola business in recent years, their claim merely being that they formerly owned an interest therein, which is true." (Rec., Vol. I, p. 286.) As neither the District Court nor the Court of Appeals gave credence to their claim of title, it is needless to pursue the subject further.

The interests of the Pemberton Chemical Company passed to the Pemberton Medicine Company, a partnership of which J. C. Mayfield was a member and which he alleges was a remote predecessor of the various Koke companies, respondents herein. Wine of Coca was the property of this medicine company as it had been of the chemical company, but after July, 1887, neither the petitioner nor any of its predecessors had anything to do with Wine of Coca, nor were any of them in anywise responsible for any claims or statements made in its behalf in trademarks, labels, advertisements or otherwise.

Coca-Cola a Distinctive Beverage.

From another point of view it is interesting to take note of the respondents' claim of title made not "in recent years" and, therefore, in the early days of the business.

Everybody connected with the business in any way, or at any time, recognized Coca-Cola as a distinctive beverage and as bearing a distinctive name.

As time went on and the business increased, the beverage growing every year in popular favor, many people set about making something as nearly like it as they could, and if possible indistinguishable therefrom, and they gave to what they made, names which, nearly or remotely, suggested Coca-Cola to the consumer. First and last there are more than thirty of such beverages and names mentioned in the record.

Sometime in 1888 Dr. Pemberton, together with J. C. Mayfield, A. O. Murphy and E. H. Bloodworth, formed the Pemberton Medicine Company and engaged in the business of making proprietary medicines. Their letterhead at the beginning, as shown by a letter of March 8, 1888, Defendants' Exhibit 21, proclaims them to be "Sole proprietors of Pemberton's Wine of Coca, Globe Flower Cough Syrup, Gingerine, Liver Pills, Lemon Juice Cordial, Indian Queen Hair Dye, etc.," but no mention of Coca-Cola.

Mr. Murphy was called as a witness for the respondents and testified as to the agreement between himself and associates and Dr. Pemberton. According to this testimony it included Coca-Cola which Pemberton had already parted with. Speaking of the staples of their business, Murphy said:

"We sold the entire line * * * but the Wine of Coca, it was a wine tonic put up in

quart bottles, and Coca-Cola, the fountain syrup, and the gingerine were the three we pressed more than any others." (Rec., IV, p. 1282.)

But no mention of Coca-Cola in their advertising.

But very soon, he says a controversy arose, Dr. Pemberton asserting that he had sold the right to make Coca-Cola to his son Charlie. He promised, however, to "get us up a substitute which would be identically the same thing under a different name." (Rec., IV, p. 1283.) They yielded, he says, to the doctor's contention and suggestion and made the same thing under a different name:

> "We first started out with name called Yum-Yum, and then we got onto one or two others, Koke, and I think perhaps we got something into Dope, too, something like that. This name Koke was kept up after I left the concern. Spelled K-o-k-e." (Rec., 1283.)

J. C. Mayfield, Sr., testified to like effect with Murphy as to Dr. Pemberton asserting a previous sale or transfer to his son of the Coca-Cola business and he says, concurring with Murphy:

> "We all discussed it in the doctor's presence and agreed that we would make the same goods and call it something else, the same formula." (Rec., IV, p. 1589.)

He says they discussed various names. They put out a little under the name of Yum-Yum.

"We did for sometime, however, sell some Coca-Cola to the old Coca-Cola customers. * * * After we did not ship it out as Coca-Cola we shipped it out as Koke." (p. 1590.)

The reason for abandoning the name Yum-Yum and taking that of Koke undoubtedly was that Koke was an abbreviation or nickname of Coca-Cola. Murphy himself suggests this. He says:

"* * * We had a discussion about trying to keep the name Coca-Cola." * * * (p. 1284.) "We tacitly and silently went to work to see if we could offset it in some other way." * * * "We * * * agreed on Koke." * * * (p. 1289.) "I cannot say whether the general public at that time had adopted any nicknames for Coca-Cola. I say it is very natural. Perhaps one might be used interchangeably with the other —might be nicknamed for the other. * * *"

"We adopted the name Koke because it was the best way out of the emergency that we could see. We racked our brains to get up something with which we could meet the emergency, and that was the solution. Our idea in meeting the emergency was to still retain the thing that we had bought in some other way if we possibly could, to meet the emergency that was sprung upon us by Dr. Pemberton. He was violating his contract in regard to this particular preparation, and in adopting the name 'Koke' our idea was just such things as would influence a business man in an emergency of that kind. I would not

undertake to state that this thing or that thing influenced us to make a move of that kind. This may have been instigated by business interests, such interest, such influence as would control any business man in making a business move in an emergency." (Rec., 1290.)

Describing the process of manufacture, Murphy says:

"The way we used to make that product we took the actual extract from coca leaves, it was black as tar and strong enough to knock a bull down, and then the extract from the cola nut, and mixed those two with certain preparations, with this syrup, and made it from that. We bought the actual leaves themselves." (Rec., Vol. IV, p. 1285.)

Here Murphy particularizes as the principal ingredients of the beverage, aside from the simple syrup, the coca leaf and the cola nut.

Mayfield says that he had Pemberton's precise formula.

"He (Pemberton) got his formula book and called it over to me word for word * * * and I copied everything word for word as he gave it out, with complete instructions."

Respondents adduced this testimony in disparagement of petitioner's title, but it proves that Coca-Cola was a distinctive beverage, that coca and cola

were essential elements of it and that Coca-Cola was not a misleading name for it and Koke a natural abbreviation of the name.

In the opinion of these men, when title is involved there is nothing deceptive in the name and nothing useless in the formula. It is only when the respondents are challenged for piracy of petitioner's good will that the formula becomes worthless, and the name misleading.

Imitations.

As the business developed and the advertising of Coca-Cola was greatly increased from year to year, imitative products were brought upon the market under imitative names. Almost universally the names were hyphenated and in a majority of cases the last word in Coca-Cola was the favorite for adoption. There was Koke, Ko-Nut, Kola-Ade, Coco and Mi-Coca. Of the compounds adopting Cola, there was Afri-Kola, Chero-Cola, Ala-Cola, True-Cola, Wise-Ola, Arrow-Cola, Carre-Cola, Star-Cola, Mar-Cola, Nerve-Ola, Candy-Cola, Mova-Cola and others. Some preferred the "K" to the "C" as the initial letter. Some sought the aid of alliteration and some scorned it. They were all alike in this one respect. The manufacturer sold to the dealer for a less price than was asked for Coca-Cola and the

retailer sold to the consumer for the same price that he got for Coca-Cola. Little or nothing was spent in advertising any of these imitations, and to the consuming public they were almost unknown. They were, with negligible exceptions, used as fraudulent substitutes for Coca-Cola.

Here, then, was a beverage, the formula for which was made by the petitioner's predecessor, and which the petitioner brought into general use through business capacity and extensive advertising.

Growth of Business

What had been done in the way of advertising and increase of business the following tables taken from Volume I, pp. 307 and 308 will show:

SALES OF SYRUP.

	Gallons		Gallons
1886	25	1900	370,877
1887	1,049	1901	468,411
1888	1,933	1902	677,515
1889	2,171	1903	881,423
1890	8,885	1904	1,133,787
1891	19,831	1905	1,548,888
1892	35,360	1906	2,107,661
1893	48,554	1907	2,558,782
1894	63,933	1908	2,877,732
1895	74,479	1909	3,486,526
1896	116,492	1910	4,190,149
1897	167,681	1911	4,815,677
1898	214,008	1912	5,504,956
1899	281,055	1913	6,767,822

ADVERTISING EXPENSES.

1892	$11,401.78	1903	$ 200,941.40
1893	12,395.12	1904	280,985.12
1894	14,538.14	1905	356,552.07
1895	17,744.22	1906	486,553.47
1896	23,117.58	1907	550,775.12
1897	52,405.18	1908	624,077.70
1898	43,857.62	1909	675,048.59
1899	48,564.83	1910	853,329.13
1900	84,507.97	1911	978,329.30
1901	100,276.01	1912	1,182,257.29
1902	149,628.79	1913	1,186,210.39

NICKNAMES AND SLANG TERMS.

The several imitative beverages did not venture to use the name Coca-Cola and so they encouraged as much as possible the use of nicknames and slang names. With such names in use, which it could be asserted did not specifically, accurately and exclusively designate a particular product, substitution would be facilitated and would more readily lend itself to absolution. It was easy for a fraudulent dealer to say that the man who called for Coke or Dope did not necessarily want the beverage made by petitioner for if he did, he would have asked specifically for Coca-Cola.

The petitioner used its best endeavors to induce the public to call for Coca-Cola by its full name and to avoid nicknames, while its competitors, and so far as this case is concerned, the respondents, were aggres-

sively pushing the use of names Dope and Koke for their product.

The two names were used by them for the same article.

The Origin of the Name Coke.

The name Coke or Koke explains itself. The usage is universal to abbreviate the names of persons or things with which we are familiar. We have Abe for Abraham, Joe for Joseph and Will for William, etc. And so it is with things. This record shows that Budweiser beer, where it was sold was called for, not by its full designation of Budweiser beer, but by its first syllable "Bud." And so Coca-Cola was called for frequently as Coke. It was inevitable that this should be so and more and more as the beverage came into greater use.

The Origin of the Name Dope.

The use of slang is the habit of an indolent mind which refuses the labor necessary to acquire the extended vocabulary requisite to a clear and definite expression of the meaning intended, and so makes one word or one phrase serve vaguely many uses. The word "Dope" is itself an excellent example. It means many things and cannot be understood without reference to its context. It means the

schedule of a horse race, the programme at a theater, the menu at a restaurant and when such things were, the wine list. Information of any event, past, present or to come, whether the information be prophetic, conjectural or historic, be the event a baseball game or a national election, is "Dope" as to that event. It may mean not only information but also the thing to which the information relates, not only the menu, but the food mentioned in it, not only the wine list, but the wine bottle. It means any thick fluid from gruel to gravy, or from axle grease to the burglar's nitroglycerine. It means narcotics of any kind and information of how and where to get them, the "Dope" to get the "Dope." With such a word much is left to inference, or to be determined by mutual understanding from established usage. As Coca-Cola came more and more into general use as a beverage, the slang addicted person called for it by this slang name as others did under the abbreviation. And so "Dope" as well as "Coke" suggested itself to respondents as a good name under cover of which the good will of the Coca-Cola business might be diverted. With some it may have had a sinister significance and implied a drug of some kind. This was an objection to its use as a trade-mark by a legitimate dealer and the only reason for its use was that it would carry with it a cover for substitution. The petitioner always ob-

jected to the name, advised against it in its advertising, but the respondents used it wherever they found it in vogue. Coke in one section, Dope in another as the one or the other gave opportunity for the sale of a beverage which was offered as the equivalent of Coca-Cola and so without paying therefor get the benefit of its reputation and advertising. In the South generally "Dope" was used, while in Texas it was almost unknown and "Coke" was the popular designation.

How Substitution Was Effected.

The respondents saw this situation and how to take advantage of it. They went to the retail dealer and said, in substance, many people come to you wanting Coca-Cola and call for it under the name Koke or Dope. We have a similar beverage to which we apply those names, either the one or the other as may best suit the occasion. As either name is used by your patrons, serve him with our beverage, which you may well enough do, because he has designated it by our name for it. The Coca-Cola people do not claim these names. They do not make Koke or Dope. They make and sell only Coca-Cola. You are giving your customer just what he asks for and he probably will not detect the difference and you will make a greater profit. And so while it is true that the petitioner does

not claim the words Koke and Dope as properly designating its product, it does complain of the fraud practiced upon it and the public by passing off respondents' beverage when that of petitioner is wanted. That this fraud was practiced by respondents, is expressly found by both the lower courts.

The evidence that usually when Coke and Dope are called for, Coca-Cola is wanted is collated in Schedule II, while the evidence of how the nickname and the slang are used by respondents to aid substitution is to be found in Schedule V.

Coca-Cola Not an Alcoholic Beverage.

A defense not specifically passed on by either of the lower courts is, that Coca-Cola is an alcoholic beverage. The negation of this is implied in the opinion of each of the courts, and the matter was no doubt passed *sub silentio* because of the want of any evidence to sustain it.

From the testimony of J. J. Kessler, a chemist called by the respondents, we may deduce that Merchandise No. 5 brings into the syrup an amount of alcohol which is less than one-fourth of one per cent of the whole. Other extracts and essences may contribute something, but the total cannot bring the al-

coholic content of the syrup above one-half of one per cent.

But the syrup is not the beverage and is so heavy with sugar and cloying that to fit it for consumption it is attenuated to one-seventh of its strength by the addition of carbonated water, so that the beverage as bottled or as sold at the soda fountain, which means as used by the public, contains not more than one-fourteenth of one per cent of alcohol or not more than one-seventh, as much as under the Volstead Act a beverage may contain and not be classed as alcoholic. To get an ounce of alcohol via Coca-Cola one must consume about 22 gallons of the beverage.

We pass now to the questions presented by the opinion and decision of the Court of Appeals.

I.

COCA-COLA AS ORIGINALLY MADE.

The Court of Appeals said that the business conducted under the name Coca-Cola is not entitled to protection at the hands of a court of equity; first, "because in the beginning, and for many years thereafter, the coca of which its compound was in large part made contained the deadly drug cocaine."

As we understand this, it means that the cocaine content of the compound made the beverage a noxious one.

In our view no such issue is presented by the pleadings. In the answer filed May 28, 1914, there was no allegation presenting such an issue, nor was there any in the elaborate amendment filed April 2, 1915. The pleading was all to the effect that the product was misbranded because it did not contain coca in any form. August 6, 1915, a brief amendment was filed alleging that the product was made and sold in violation of the Harrison Act of December 17, 1914, because it did contain cocaine and was sold as a beverage. But the repeated allegations of the answer that the product contained no coca were not withdrawn.

It is several times alleged that the beverage is misbranded because it does not contain coca, and of course, if it contains no coca it contains no cocaine. For example, in the 24th paragraph of the answer (Rec., 52) it is said explicitly that:

> "There are substances known as Coca and Cola under their own distinctive names, but plaintiff's food product 'Coca-Cola' contains no coca, and no coca leaf *and no extract derived therefrom.*"

That of course excludes the presence of cocaine.

This allegation, it may be said, refers to a recent period and not to the remote past.

In paragraph 22 of the answer (Rec., 49), in which respondents undertake to impeach the registration of the trade-mark under the Act of 1905, they say that the statement and declaration for registration:

> "Contained the false and fraudulent statement and representation that plaintiff's said product to which it applied said name 'Coca-Cola' was a nonalcoholic beverage made from an extract of coca leaves and cola nuts, and consequently, said name was improperly registered, and the registration thereof was invalid, and conferred no right upon the plaintiff to the use and protection of said name 'Coca-Cola' as a trade-mark, as applied to plaintiff's said product, under and by virtue of the provisions of said Act of February 20, 1905, inasmuch as the respondents, their predecessors and those through whom they claim, were at that time, and had been for many years prior thereto, the owners of and using their said trade-mark name 'Koke,' and applying it to their said product, and inasmuch as plaintiff's said product 'Coca-Cola' *was not then,* and is not now, a nonalcoholic beverage, *nor was it then, nor is it now, made from an extract of coca leaves and cola nuts.*"

This plainly applies to the period prior to 1905.

In the assignments of error made on the appeal

the respondents say in No. I (Rec., 251) that plaintiff's said product contains no coca and no cola; and they repeat this on page 252, and in No. II it is said several times that Coca-Cola is misbranded because coca and cola are not present in it, and again in variant form in No. VIII. True the contrary as to the present composition of Coca-Cola in these same assignments of error, is asserted with almost as much repetition. In No. IV (Rec., Vol. I, p. 254), it is said that the product contains not only cocaine, but also alpha and beta eucaine, and in paragraph No. 5 of assignment No. VIII (Rec., 257), it is said in terms:

> "That plaintiff represents to the public through its advertising and otherwise, that its said product does not contain cocaine, when in fact it does contain cocaine."

We cannot refute both propositions asserted by the respondents. The truth is, and there is no conflict in the evidence respecting it, as the Court of Appeals determined, that in the beginning the beverage did contain cocaine and it is easy to determine just how much.

The formula in complete detail is not shown in the evidence, but it appears and is not disputed that what is called Merchandise No. 5 is an ingredient. It is made up in batches of nine hundred gallons and

is an extract of coca leaves and cola nuts. Three hundred and eighty pounds of coca leaves and one hundred and twenty-five pounds of cola nuts are treated with an alcoholic liquid less than twenty per cent strong. In the old days the coca leaves were not decocainized and so the mixture contained so much of cocaine as was extracted from the leaf. Sixteen gallons of this mixture are used in making twelve hundred and fifty gallons of the syrup. One ounce of the syrup to which six ounces of aerated water are added, constitute the drink as it is served at the soda fountain.

The coca leaf contains about one-half of one per cent of cocaine. So in 380 pounds of coca leaves, or in 900 gallons of the extract, we have 1.9 pounds of cocaine. In sixteen gallons of the extract, or 1,250 gallons of the syrup we have 16/900 of 1.9 pounds, or 1/30 of one pound. This syrup serves for 128 drinks per gallon at the fountain making 1/699 of a grain per drink. There is no evidence to show and no evidence was offered to show that this minute quantity of cocaine was deleterious to health, and so the use of it, even if that use were openly proclaimed, would not constitute such unconscionable conduct by petitioner as to bar it from any relief in a court of equity. We may assume that because the amount of cocaine was so small, the respondents

preferred the other alternative as a defense and so alleged in the answer as they did, that there was no coca or no appreciable quantity of coca in the beverage.

Some cocaine there was, so much as there was in the coca leaves used in making the compound. Some effect it may have had, but as to this there was no evidence.

The answer of the respondents is that the beverage contained no coca, thus necessarily asserting that it contained no cocaine. But coca and cocaine are neither synonymous nor identical. Coca is the leaf, the crude herb. Cocaine is an alkaloid contained in the herb. There is more than two hundred times as much of the herb coca as of the alkaloid cocaine. In making the beverage originally, something other was wanted of the herb coca than the alkaloid cocaine contained in it. Had cocaine, as such, and only cocaine been wanted it would have been more convenient and economical to use the pure cocaine which could then, without any restriction be bought in the market as such. Instead the leaves of the plant entire were used and adding to these the cola nuts with a medium of diluted alcohol, a decoction was made which was an element of the beverage and did contain both coca and cola, however little or much of cocaine there was in it.

Elimination of Cocaine.

But as to the cocaine it is to be remembered as a fact and so found by the Court of Appeals that while the beverage at the beginning and for years contained cocaine "long prior to the bringing of the present suit the drug cocaine was practically eliminated from the drink." Not only practically, but absolutely, so far as that unqualified statement may be made of anything. This change was made as early as 1900. (Rec., 418.)

But coca leaves and cola nuts were used as before in making the syrup, save that the cocaine was eliminated. Thereafter, and this is not only admitted but is made a matter of reproach to the petitioner, this extract of coca leaves and cola nuts in a weak alcoholic solution, the cocaine having been eliminated, was bought from the Schaeffer Alkaloid Works at Maywood, New Jersey. The respondents say in argument that a part of the business of the Schaeffer Works was the extraction of cocaine and this cocaine was the product which they sold. With the extraction of the cocaine, it is argued, the coca leaves were of no further use to the Alkaloid Works and became mere waste, and petitioner bought this waste because it was to be had at less cost than to buy the coca leaves and extract the cocaine for itself.

This may be so and it is not the first instance in the advance of industrial arts in which something that once had been waste became a valuable by-product.

However it might be done or by whom, the elimination of cocaine was accomplished and thereafter the beverage contained no cocaine. But the petitioner did not buy decocainized leaves from the Alkaloid Works. It bought "Merchandise No. 5" and this was a solution in dilute alcohol of coca leaves, from which the cocaine had been taken out and of cola nuts. The beverage was in strict conformity with the Food and Drugs Act which prohibited, in articles of food, any poisonous or other added deleterious ingredient which may render the food injurious to health and required the package in case of drugs to bear a statement of the quantity or proportion of cocaine or other narcotic contained in it. The failure of the label thereafter to proclaim cocaine as a constituent of the beverage was tantamount to a declaration that the coca leaf in it had been decocainized,—that there was coca but no cocaine in it. And this negative instruction to the public was aided by affirmative declarations of persistent advertising in which the statement was repeated over and over again. If there remains in the mind of anyone, a lingering belief that there is any cocaine in Coca-

Cola it is beyond doubt due, more than to anything else, to the application by the respondents of the equivocal nickname "Dope" to a beverage similar in appearance and in taste.

We submit that as for years prior to the institution of this suit there has been no cocaine in Coca-Cola and this has been as constantly and as widely announced as possible, the petitioner should not, because years ago the beverage did contain a barely perceptible amount of cocaine, be denied protection against the unfair competition which the respondents according to the unequivocal finding of both lower courts and upon abundant evidence, have practiced against the petitioner.

II.

THE ADDED CAFFEINE DID NOT MAKE THE NAME A MISBRANDING.

The finding of the Court of Appeals is that:

> "The caffeine, which constituted the other main ingredient, was derived mainly and indeed almost exclusively, not from cola nuts, but from tea leaves."

As a finding of fact we take no exception to this. The statement is true that the caffeine in the beverage was not derived mainly from cola nuts. It may not have been derived from tea leaves, but that is im-

material. There are several sources from which it could be obtained.

Granting all this, it is not apparent how or why the word cola in the name becomes a means of deception. Cola nuts were used for other reasons than that they contained caffeine. Counsel for respondents assume the absolute identity of cola and caffeine. The man who originated this beverage did not. He wanted these bitter seeds. How much? Just so much as through his experiments he had found was necessary to make the beverage agreeable to the popular taste. Whether that was much or little is not material to the present issue. Caffeine was wanted for its stimulating qualities, and more of it than was contained in the cola nuts used. Just how much more, as in the case of the other ingredients, was determined by experiment. Enough of the extract of cola to supply this, would no doubt make the drink too bitter. Counsel agree that "it would not be practicable to supply it (the caffeine) in that way." Court of Appeals Brief, p. 176. So caffeine in pure form must be added. From what was that to be obtained? It mattered not as to the quality of the beverage and the source from which to obtain it would in fact depend upon commercial and industrial usage. The name given to the beverage was not suggested by the caffeine as caffeine any more than by the cocaine as co-

caine, but by the herbs, the coca leaves and the cola seeds.

The Court of Appeals opinion, however, holds in effect that cola in the name not only suggests that there is caffeine in the beverage, but further that this caffeine is derived mainly if not entirely from cola nuts. Cola is the name of the tree whose seed is known as the cola nut, and this nut contains a small percentage of caffeine. Cola is the comprehensive word, including tree, leaf and nut and whatever is contained in any of them, and the use of the leaf or the seed would as much, or more, justify the word cola in the name of a compound, as the use of a single element extracted from the nut, and especially so, if that element as it was bought and sold and used among men, was rarely derived from the cola nut. So caffeine is not the only or exclusive signification of cola. The presence of caffeine might well be inferred from the word cola, because cola does contain caffeine, but that all the caffeine in the beverage was derived from cola nuts does not follow. As to any added caffeine the fair inference would be that it was obtained from the usual source.

The pioneers in the business, thirty and more years ago, had no thought of this litigation. They used coca leaves and cola nuts for savor and flavor and

taste and smell. And in a popular beverage these were new elements and, in their crude form, bulked large and so suggested the name Coca-Cola. And the respondents say that they too in those early days when this litigation was not within dreaming distance, for a month or two did the same thing. They say that from coca leaves and cola nuts they made an extract and added pure caffeine, with a syrup and other ingredients and called the composite Coca-Cola, although the added caffeine was not derived from cola nuts.

The question here is one of fraud upon or deception of the general public. Did the general public believe that the caffeine in the beverage was obtained mainly or entirely from cola nuts? Did they further believe, whether the belief was well informed or a groundless delusion, that caffeine so derived was better than or different from caffeine otherwise derived? There is no suggestion in the case, nor basis for any, that there is any popular delusion involved, and we must assume that the general public knew whatever was to be known about caffeine or that they knew nothing about it. Whatever we assume, there was no fraud or deceit in the name. If they knew nothing of caffeine, the name told them nothing. If they knew what was to be known, the name told them that the beverage contained cola in some form, leaf or nut, and so might

contain caffeine. As to any added caffeine the name said nothing and passing from the suggestion of the name to the fullest possible knowledge, they must assume that it was not derived from cola, because in the chemical industry it is not so derived.

Even if the word cola in the name was suggestive in the manner and measure implied by the Court of Appeals, in a case where the facts are as in this, it would be without significance. To say that a thing is something with which it is absolutely identical cannot be a material misrepresentation. Conceding for the sake of the argument that the name Coca-Cola suggests everything that can be claimed for it in the way of representations as to caffeine, and the answer is that there is but one such substance. Caffeine is caffeine. It may, like gold and silver, be found in combination with other things, but as it is brought into the marts of men, it is like the gold and silver, refined of its dross, and as they are gold and silver from wheresoever taken, so it is with caffeine. There are not two kinds of caffeine. A statement that anything contains caffeine is explicit. There is one and only one standard by which it may be tested. As well distinguish between the gold which Cortes found in Mexico and that which Pizarro found in Peru.

If the pioneers, when they had perfected the beverage, had called it Coca-Caffeine, instead of Coca-Cola,

there would certainly have been no deception and yet the name would be as much a misnomer, and for the same reason, as in the case of Coca-Cola. The name would suggest caffeine derived from coffee, when in fact it was not so derived. So far as the caffeine itself is concerned the very same beverage might with entire accuracy have been called Coca-Cola, Coca-Caffeine, Coca-Thein, Coca-Mate, Coca-Guarana, or Coca-Youpon, because cola, coffee, tea, mate, guarana and youpon all contain the element caffeine and it may be extracted from them. And it is agreed that caffeine is caffeine from whatever plant derived. As contained in these different plants and no doubt in others, it is, when extracted, not similar but identical. Water may differ as it is derived from sea or lake or river or spring, but when it is distilled and rendered *aqua pura* it is the same no matter whence derived. The cola nut does not resemble the tea leaf in appearance, nor does the tea leaf resemble the coffee bean, but the stimulating element contained in the leaf, the bean and the nut, is, when found, the same thing. Upon this the authorities and even the experts are all agreed. Caffeine is caffeine and it is nothing else. To distinguish caffeine derived from the coffee bean from that found in the cola nut or the tea leaf, is like distinguishing *aqua pura* from *aqua pura*.

Commercially speaking, caffeine is usually derived from tea, because this contains it in larger percentage than does anything else, running there from two to four per cent. So, common business sense suggests that if you want caffeine get it from the tea plant. Cola nuts contain less than one-half the percentage. And coffee which gives to the element the name by which it is generally and almost universally known, contains even a less percentage than cola nuts. Caffeine, commercially speaking, is not made from coffee but from tea. And so caffeine is sometimes called theine, and theine, the Century Dictionary says, is:

> "A bitter crystallizable principle C8 H10 N4 O2, found in tea, coffee and some other plants, tea yielding from 2 to 4 per cent. It is considered to be the principle which gives to tea its refreshing and gently stimulating qualities; same as caffeine."

Caffeine suggests an extract of coffee and theine suggests an extract of tea, but the extract of coffee is sometimes called theine and the extract of tea is usually called caffeine. But there is no deception in this shifting of names, because the thing itself is, in either case, the same. The names were made to order to fit the thing. They are words of the new Latin, so freely used in chemistry. Each one consists of a substantive with the

suffix in or ine added. We had the tea, or thea and to designate the active principle we added the suffix which gave us the name theine. So we had coffee or caffe and by adding the suffix we get caffeine. But the thing was the same and so the names were used indifferently, until the general usage came to prefer caffeine from whatever it was derived.

And so when later it was found that this same principle was contained in the cola nut we might have gotten another name for it, and that is coline, and it would have been more appropriate perhaps than caffeine, because the Century Dictionary says that "they (cola nuts), have been found to contain two or three times as much caffeine as coffee itself," but the name coline has not been and probably never will be admitted to the dictionary, as there is no occasion for it, since the thing to be so designated has already two names, by either one of which it is known and identified and needs no other name to announce its derivation, because caffeine is caffeine.

It is assumed rather than proved in this case that the caffeine used in making Coca-Cola syrup is derived from tea leaves. The assumption is not all unwarranted and is more than probably true, because caffeine is usually derived from tea leaves, and for the sole reason that they contain it in largest proportion. So derived it is neither better nor worse,

stronger nor weaker than otherwise derived. It is simply the same.

Additional caffeine being wanted in making Coca-Cola syrup above what is contained in the cola nuts used, the caffeine is bought in the general market and is probably, but not necessarily obtained from tea leaves. Assuming that the caffeine is derived from tea leaves, it is said that the name Coca-Cola as applied to the beverage is a deceptive one, because the active principle of cola is not contained in it save in negligible proportion. And so, it is asserted, people are deceived. But people either know or they do not know what that active principle is. If they do know, they know that it is caffeine, and as the beverage contains caffeine, the very same principle that is found in the cola nut, they are not deceived, because they expect caffeine and they get caffeine. And those who do not know that caffeine is the active element in the cola nut, who do not know what that active element is, and who simply want it, whatever it may be, they are neither disappointed nor deceived for they get what they want, albeit they know not what it is.

But all this ignores the use of the crude cola nut, which as a matter of taste and flavor is something different from caffeine. The cola nut is used, it is true, in small quantity and proportion, but every

constituent of the beverage except sugar and water is there in very small quantity and proportion. The syrup itself is more than 95 per cent sugar and water and diluting this with six times the volume of aerated water, the beverage as consumed contains about .71 of one per cent of other ingredients. There are eight or nine of these and so the proportion of any one of them must be very small, the fraction of a fraction of one per cent. It might well be objected to any of the ingredients, added to the sugar and water, that there was not enough of it, to justify giving its name to the drink, and yet here was something distinctive with a taste and flavor of its own and which was offered to the public and accepted by them under the name Coca-Cola for more than thirty years and in continuously increasing amount.

And so distinctive was the beverage in taste and flavor and so definitely was the name Coca-Cola attached to this distinctive beverage, that everywhere imitations of the beverage were made and offered to the public under imitations of the name and in the imitation of beverage the producer went just as far as he could and in the imitation of name just as far as he dared.

The consumer got what he wanted when he called for Coca-Cola. The name identified the beverage and it was not deceptive for it suggested no ingredient

which was not in the beverage and it denied nothing which was contained therein.

The Fig Syrup Case Distinguished.

The Court of Appeals based its decision upon the opinion of this court in *Worden* v. *California Fig Syrup Co.*, 187 U. S., 516. The cases are to be broadly distinguished upon substantial grounds of difference. In that case a medicine was involved; here a mere beverage. There the thing was not what it was said to be and the misnomer was both a suggestion of falsehood and a suppression of the truth; here it was neither. There the name asserted that the product was syrup of figs, when it was not and did not contain any syrup of figs. Here the very nature of the product and its use excluded the suggestion that it was exclusively coca and cola, and it does contain some coca and some cola. There the active principle of the medicine was asserted to be syrup of figs, which involved a double falsehood. There was no syrup of figs in the medicine and the potency ascribed to syrup of figs existed only in a popular delusion fostered and designed to be fostered by the name. Here was nothing of the kind, no popular delusion to be indulged as to the virtue of coca or of cola, and coca and cola in fact ingredients of the beverage. There was suppression of the truth; no suggestion of the fact that the active principle of

the medicine was senna, and the fact suppressed because the name attributed the virtues of senna to the nonexistent syrup of figs. Here nothing contained in the beverage was negatived by name or implication. There the name appealed to a prevalent popular opinion—as to the laxative efficacy of syrup of figs—and practiced a deception through that opinion. Here so far as there was a popular opinion, the name of the beverage was consonant with it. The rule declared by the court was that "where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed in it" l. c. 528, and quoted as illustrating the proper application of the rule what was said by Circuit Judge Colt in the case before him, *California Fig Syrup Co.* v. *Putnam*, 66 Fed., 750, 751, viz.:

> "The leading representation on the labels, packages, and in the advertisements of this preparation is that it is a laxative fruit syrup made from the juice of the California fig. The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. It may be true, as a

> scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless but it is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

Compare that with the present case. A man calls for a drink, not a dose, of Coca-Cola. He may assume that he will get something into the composition of which the cola nut enters in some way. And so it does. The crude cola nut is used in making it. But it may be said he wants not the fiber of the nut but its active principle. He may not know what that is, but assume that he does. It is caffeine and he gets caffeine and more than was found in the cola nuts used. There is here nothing like the substitution of an extract of senna for a syrup of figs, but simply an addition of the same thing differently derived. But the thing derived is the same. It is the same to the sight, the touch, the taste, the smell, in chemical composition and in therapeutic effect. Where then is the fraud? Where is "the distinct assertion which is false"? Where is even the harmless indulgence of an unfounded popular opinion?

The real offender in the case is the word "caffeine," which is in itself a misnomer. It is not generally obtained from coffee but from tea and so its name should be theine. But caffeine and theine are identical and theine is in general use called caffeine and in fact this element from whatsoever plant derived is called caffeine and has not a distinctive descriptive name for each different derivation. If it had, it would be called coleine when derived from cola, mateine when from mate, guaraneine when from guarana, yuponeine when from yupon, and so on. But all this would make for confusion and not for clearness, as it would apply many names to one and the same thing. And so if the word cola in the name is held to suggest the presence only of the caffeine contained in the nut and not the fiber of the nut, for which there is no warrant, there is still no misrepresentation, for there is caffeine in the beverage, and the only reason for assuming that this caffeine was not derived from cola nuts, is, that it is usually, because more economically, derived from tea leaves.

The case is more like that of *United States* v. *Antikamnia Co.*, 231 U. S., 654. There the preparation in question contained acetpheneditine, a derivative of acetanilid. The Act of Congress required that the label in the case of drugs contain a statement of the

quantity or proportion of certain drugs and of their derivatives if contained in the preparation, among which was acetanilid. The label stated the quantity of acetpheneditine present and stated also that there was no acetanilid but did not state that acetpheneditine was a derivative of acetanilid, nor did the law by its explicit terms require that it should do so. But the Secretaries of the Treasury, Agriculture and Commerce and Labor, in pursuance of the law and in the course of its enforcement did make the requirement. The government in that case conceded that in chemistry "the derivative is not necessarily, and perhaps not usually, obtained from the specified primary substance. It may be derived from it or it may be independently produced." The libel in the case charged that the statement of the label that the preparation contained no acetanilid was false because the preparation did contain a derivative thereof. The primary substance and the derivative in that case were not like the active principle of tea, coffee, cola, etc., identical substances, but were physiological equivalents, and because they were such, the regulation of the secretaries was sustained as the exercise of a power within the law and essential to its enforcement. The label must therefore inform the public that the original and the derivative were essentially the same thing.

The beverage in the present case containing extract of cola nuts reinforced, it matters not in what proportion, by the active principle contained in the cola nut, although not obtained therefrom, and differing in no respect whatever, color, taste, smell or therapeutic effect, from the beverage containing extract of cola nuts, reinforced by the same element derived from the cola nut, it cannot be said there is any misbranding in the use of the word cola in its name and the emblem of the cola nut on the label.

In *Cleveland Stone Co.* v. *Wallace*, 52 F. R., 431, the complainant advertised scythe stones derived from the same quarries under various and different names, suggesting different quarries, and this was objected against it as deceptive conduct precluding it from equitable relief. The court said, l. c., 437:

> "It is claimed that the case of the plaintiff is brought within the operation of this rule by its own and its predecessors' circulars and catalogues, stating that the various patterns and brands of scythe stones in controversy are made at, *e. g.*, the 'Willow Creek Quarry,' 'Green Farm Quarry,' 'Pt. Au Barques Quarry,' etc., and 'from selected Huron grit,' 'from the best blue Huron grit,' etc., whereas the stones of various names were made from the same quarries. The context in which these statements are found makes it plain that the quarries thus designated are located at Grindstone City, Mich., and in

some cases this is expressly stated. There is nothing to prevent plaintiff from thus nominally subdividing its properties at that place, or giving to these titular subdivisions such names as fancy may suggest. There is in such nomenclature no material false statement, nor is the public misled into the purchase of one class of goods instead of another. If the manufacturer chooses to associate one brand or trade-mark of his goods with a name arbitrarily given to a part of his works or quarries, *no wrong is done to the public, so long as he furnishes the identical article demanded by the preference of his customers.* The representation that the stones are made from 'selected' or 'the best blue Huron' grit are substantially satisfied if the quality of the materials used is not inferior to that which the trade have accepted as of that grade."

Before a complainant is outlawed entirely there must be actual deception of the public, something more than mere inaccuracy of statement in names, labels or advertisements. In *Jacobs* v. *Beecham*, 221 U. S., 263, it was urged that plaintiff because he called his product "Patent Pills" when it was not patented, did not come into court clean handed. The court said of this:

"The other grounds of appeal are charges that the plaintiff's boxes have upon them false statements such as to exclude him from equitable relief. The one most pressed is that certain of the boxes carry the words Beecham's Patent

Pills, and that the pills are not patented. The answer is that the word does not convey the notion that they are. To signify that, the proper word is 'patented' rather than 'patent,' and it is commonly used separately, not prefixed to a noun. On the other hand, the use of the word patent to indicate medicines made by secret formulas is widespread and well known. It is mentioned in the dictionaries, and it occurs in the plaintiff's circulars. We think it clear that there is no danger that anyone would be defrauded by the form of the label on the plaintiff's box, and that it would be wrong to press *Holzapfel's Compositions Co.* v. *Rahtjen's American Composition Co.*, 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6, so far as to cover this case."

The name to be outlawed must be something more than a mere misfit or nondescript. It must be misleading or deceptive in some material respect, savoring of fraud.

In *Thaddeus Davids Co.* v. *Davids et al.*, 1 Trade-Mark Reporter, 215, l. c., 218, three defenses of like nature with that here under consideration, were presented and they were advanced as here under the shield of the Fig Syrup case. The court disposed of them in short order. It said, and we quote all that was said on the subject:

"Three defenses are urged that will merely be noted: 1st. It is said that complainant has

long so misled the public in respect of its products that its trade-mark is not deserving of protection within such cases as *Worden* v. *California Fig Syrup Co.*, 187 U. S. 282. The trade-mark is the single word 'Davids.' How that single word can convey or be used to convey any false impression to the public is difficult to see; but entirely apart from this, I am of opinion that the complaints made by the defendants are without merit if they are not frivolous, viz., that 'Electro-chemical Writing Fluid' is not prepared by any electrical process; that 'Oriental Carmine Ink' does not come from the Orient, and is not based on extract of cochineal, and that 'Silk Filtered Ink' is no longer silk filtered, although it once was.'

This means that while these various names did not accurately describe the several inks to which they were applied, yet they misled or deceived nobody buying the ink. They got a good ink, such as purchasers wanted and expected to get under those names although it was neither made by an electrical process, nor brought from the Orient nor made of cochineal nor filtered through silk.

This court on appeal of this case, *Davids* v. *Davids*, 233 U. S., 461, sustained the lower court saying simply, l. c. p. 468:

> "We need not stop to discuss the contention that the complainant's use had not been exclusive, or that the mark had not been used in inter-

state commerce, or the further defense that *the complainant should be denied relief because it had deceived the public.* It is enough to say that these contentions were without adequate support in the evidence, and were properly overruled by the Circuit Court."

As to the deception of the public this ruling means that the names of the three inks in question although they were misdescriptive were not misleading, that it was not material, made no difference to the buyer and user, whether the one was made by an electrical process or not; whether the second came from the Orient or the Occident, or even whether it got its carmine from cochineal or from coal tar or whether the third, once upon a time filtered through silk, was still so filtered or through some more plebeian stuff.

Applied to the case at bar it means that it signifies nothing whether the caffeine used is expensively derived from cola nuts or in the usual and more economic way is derived from tea leaves. As the ink was ink, so the caffeine is caffeine.

III.

THE ADDITION OF THE CAFFEINE WAS NOT AN ADULTERATION OF THE SYRUP.

To be an adulterant the added ingredient must be deleterious to health. A charge to that effect is made in respondent's answer and repeated in the assign-

ments of error, but there is nothing in the evidence to sustain it. And neither of the lower courts made any finding against the wholesomeness of the beverage. Aside from the disparagements of the answer and the assignments of error there is nothing adverse in the record and on the other hand all the evidence on the subject is commendatory and to the effect that the beverage is a mild stimulant like tea or coffee and this is true and must be true because the only stimulant it contains is that caffeine which makes of tea the "cup which cheers but not inebriates."

IV.

THE EARLY CLAIMS OF MEDICINAL QUALITIES FOR COCA-COLA.

As to this the court said:

> "The labels with which the preparation was adorned contained pictures of coca leaves and cola nuts and was widely advertised and sold, first, under the name of 'Coca-Cola Syrup and Extract,' next as 'Coca-Cola Syrup,' and finally as 'Coca-Cola,' as a 'valuable brain tonic,' as 'an ideal nerve tonic and stimulant,' as a cure of 'headache, neuralgia, hysteria and melancholy' and 'of nervous afflictions,' under which representations a tremendous consumption was built up, and under which large numbers of the appellee's customers still consume the mixture."

So far as concerns the name and emblems under which the product was originally advertised and sold, the questions involved have been sufficiently considered. It was "Coca-Cola Syrup and Extract," it was "Coca-Cola Syrup" and it was "Coca-Cola." The effect of the elimination of the cocaine, "long prior to the bringing of the present suit" will be considered later.

In considering the evidence upon the subject of this finding by the Court of Appeals certain very material and undeniable facts must be kept in mind. Coca-Cola was never advertised or sold to the public as a medicine and it was never bought or used by the public as a medicine in the usual accepted sense of the word medicine. It was not sold or used in the form of pill or powder, nor was it sold or used as a precious, powerful fluid contained in a small vial accompanied with directions how often to be taken and whether before or after meals, and in what quantity whether measured by the drop or by the spoonful. On the first label written by Dr. Pemberton it was heralded as "dispensed from the soda fountain in the same manner as any of the fruit syrups." It was made up for drinking like soda water with an ounce or so of the syrup poured into a glass from a container at hand, the glass filled with aerated water and drained where it was filled all as would have

been if vanilla, or lemon syrup had been called for, and it was paid for at a like price. And in the one case as in the other the draught, not the dose, might be repeated at the pleasure of the consumer, who in neither case held himself to be a patient. The label said that Coca-Cola was "an intellectual beverage." What Dr. Pemberton meant by this we do not know. Whether the beverage was intellectual in itself, or the cause that intellect was in the drinker is not clear, nor is it very material. The label also calls it "a valuable brain tonic"—probably as fish is said by some to be a brain food—and "a cure for all nervous affections—sick headache, neuralgia, hysteria, melancholy, etc." In itself this is strong language, but not likely to be taken literally by anyone, inasmuch as it had reference not to a medicine, but to a beverage that was to be drunk as freely as milk or tea or coffee or water so far as concerned time, frequency or amount.

EXHIBIT NUMBER 271.

This is the first label composed by Dr. Pemberton and registered by him June 27, 1887. This is the label which contains the various statements quoted by the Court of Appeals in its opinion, and is the most boastful and extravagant publication to be found in the history of this case. It was not long continued, if at

all, by any of his successors, but was abandoned many years ago. There is no evidence that it was ever used by the petitioner. The necessary implication is the other way. It was not brought into the case vouched for by witnesses as a thing which had been in actual use by the petitioner or any of its predecessors. It did not come from any mart of trade, or from the files of any laboratory, drug store or confectionery establishment. There was nothing to attest it as an advertisement of recent or of ancient memory. It came in as a bare exhibit "No. 271" as the last witness in surrebuttal for the defendants, the chemist Simonson was called, and the record shows concerning it only this: "Defendant's Exhibit No. 271 offered and received in evidence. No objection." (Rec., Vol. VI, p. 2501.)

Turning to the exhibit and we find it is nothing that has ever been in commercial use but is a photograph of the label as filed by Doctor Pemberton in the Patent Office in 1887 and authenticated by the Commissioner of Patents as such photographic copy. There is nothing more of it in all this voluminous record.

July 8, 1887, Dr. Pemberton sold a two-thirds interest in the name Coca-Cola to Venable and Lowndes with the sole right to them to make and sell Coca-Cola according to his formula, reserving to him-

self one-third of the net profits of the business and on April 8, 1888, he sold to the successors of Venable and Lowndes all the right, title and interest in Coca-Cola remaining to him "With all the appurtenances and rights thereto belonging." After this neither the petitioner nor any of its predecessors were under any responsibility for anything that Dr. Pemberton might say or do.

Wine of Coca.

Among the preparations made by the Doctor was what he called "French Wine of Coca." He registered a label for this May 19, 1885. And this also in the form of an authenticated photograph was offered in evidence as an exhibit with no more explanation than that it was the label which the Pemberton Medicine Company—not the Chemical Company—Mayfield, Murphy and associates used on "their wine tonic, Wine of Coca." (Rec., Vol. IV, 1287 and 1290.) Much was made of this by the respondents in the Court of Appeals. Wine of Coca was proclaimed as a medicine and as a cure for many and various diseases, to be taken in prescribed doses at prescribed intervals. But when the predecessors of the petitioner bought Coca-Cola of Dr. Pemberton, they did not buy this Wine of Coca or any interest in it and neither they nor their successors ever had anything

to do with it in any manner whatsoever. Wine of Coca was sold to Mayfield, Murphy and their associates doing business as the Pemberton Medicine Company. All the testimony as to the use of this label is of use by that Company. Murphy was shown the label and says explicitly "This is the label we used on the wine tonic, Wine of Coca." It is not apparent how the petitioner is to be prejudiced by this conduct of the respondents.

The respondents themselves have been very insistent that there was a radical change in the methods of petitioner's advertising after or about the time of the Spanish War, a change made, they say to avoid the war tax on proprietary medicine, etc. The motive cannot be material. The fact is the relevant thing. After that war, respondents say that Coca-Cola was disclaimed as a medicine and proclaimed entirely as a beverage.

"Truth About Coca-Cola."

Coming to the post-bellum advertising, there was most criticism of a pamphlet entitled "The Truth about Coca-Cola." This was Petitioner's Exhibit 90, Rec. II, p. 447. It "is one of the books that was gotten out after the trial of the case of the *United States* v. *Forty Barrels, etc.*, at Chattanooga" in 1911. In this pamphlet it is said:

"Ignorance of the true properties of 'Coca-Cola' has caused some people to deny themselves a beverage that they like, and that is not only wholesome but physically beneficial. * * * You have heard people argue that 'Coca-Cola' must contain morphine, whiskey, or some other injurious drug, because it relieves headache. Well, there are more ways of relieving tired, weary nerves than by benumbing them with cocaine, morphine, bromide, whiskey, or coal-tar remedies. Tea, coffee and 'Coca-Cola' relieve headache by refreshing the nerves and not by deadening them. * * * There is no necessity to argue, guess or conjecture what 'Coca-Cola' contains, or does not contain. It has been analyzed by chemists of the national, city and State Governments, as well as by the professors of chemistry in the leading universities, colleges and polytechnic schools. They all find that it does not contain cocaine, whiskey, morphine, opium, bromide, or any narcotic drug."

"Habit.—Good habits are more easily acquired than bad ones. Nature herself leads us into good habits, like the bread and butter habit, the water habit, the sleeping habit,—habits that come from a physical necessity. Nature makes habits that are good. She calls for bread and butter. We get the bread and butter habit. She calls for sweets, we get the sugar and candy habit. What does habit amount to? Not a single solitary thing. * * * Now let us repeat

so that you will see plainly just exactly what habit is and the part that nature plays in it. Nature calls for bread and butter, and we get the bread and butter habit; she calls for sweets, and we get the sugar and candy habit; she calls for something to aid her in her fight against overcharged nerves, and we get the sweetness, the nerve-quieting qualities, etc. * * * You must get rid of the impression, because a thing is popular it is anything but wholesome. But leave off drinking 'Coca-Cola' at any time you've a mind to. You will have no craving for it. You may miss its deliciousness as you miss your hot biscuits in the morning; but you won't feel any other discomfort. You can't, because caffeine does not create the 'drug habit.' * * * If liking 'Coca-Cola' then, is a habit, think of the thousands upon thousands suffering with like habits, candy fiends, buttermilk drunkards, slaves to water. When anyone talks to you about the 'Coca-Cola Habit' laugh at him. * * * If you will consider this seriously, and read and read again our opening paragraph, you will find that this answers absolutely and without equivocation any and all questions as to 'Coca-Cola' containing any deleterious, injurious, or habit-forming drugs. Read the above again—it is your assurance of the healthfulness of 'Coca-Cola.' No one can get around it."

The worst offending in this latter-day pamphlet is putting it on a level with tea and coffee as a means

of relieving headache and why not, when the potent principle of each is the same and that is caffeine. Beyond this the statements are a series of negatives. It contains no cocaine, whiskey, morphine, opium, bromide or any narcotic drug or drug of the habit-forming kind. All this is true. It cannot be that Coca-Cola is habit forming in any evil sense more than tea or coffee, because the active principle in each is the same.

V.

THE RUCKER RECORD NOT COMPETENT EVIDENCE.

In the discussion of the medicinal phase of the case the respondents will no doubt rely upon and quote largely from the transcript of record in the Rucker case, which as we have said was offered in its entirety by the respondents in the District Court without suggestion of any specific purpose to be served by it, was excluded by the court, was not included in the transcript of record prepared for the Court of Appeals and was not before that court otherwise than as it was brought there bodily by respondents and filed with the clerk of the court.

There was no assignment of error upon the ruling of the District Court excluding this record.

The Rucker suit was one brought by the Coca-Cola Company in 1900 to recover taxes paid by the Com-

pany under the War Revenue Act of 1898 and which had been assessed upon the alleged ground that Coca-Cola was a patent or proprietary medicine. It was held not so taxable. 117 F. R. 1006, 125 F. R. 1004.

The act in question, by Schedule "B" under the head of Medicinal, proprietary Articles and Preparations enumerated the articles subject to the tax as follows, viz:

> "Every package, box, pot or phial, or other enclosures, containing any pills, powder, tinctures, trochies, lozenges, syrups, cordials, bitters, anodynes, tonics, * * * and all medicinal preparations or compositions whatsoever, made and sold or removed for sale by any person or persons whatever, wherein the person making or preparing the same had, or claimed to have, any private formula, secret or occult art for making or preparing the same, or has, or claims to have, any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent or trade-marks, or which, if prepared by any formula published or unpublished, are held out or recommended to the public by the makers, vendors or proprietors thereof, as proprietary medicines, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body."

The latter part of Section 20 of the act interpreted or construed Schedule "B" as follows:

"The stamp taxes provided for in Schedule "B" of this Act shall apply to all medicinal articles compounded by any formula, published or unpublished, which are put up in style or manner similar to that of patent, trade-mark or proprietary medicines in general, or which are advertised on the package or otherwise as remedies or specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use or effect."

As Coca-Cola was held in that case not to be subject to the tax, we might well contend that the record in its entirety (and so it was offered in evidence), proved that Coca-Cola was not a "medicinal preparation or composition" * * * prepared by any formula published or unpublished * * * and "held out or recommended to the public by the makers, vendors or proprietors thereof, as proprietary medicines or as remedies or specifics for any disease, diseases or affection whatever affecting the human body." And neither was it under this record in its entirety in the class of "medicinal articles compounded by any formula, published or unpublished which are put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general or which are advertised on the package or otherwise as remedies or specifics for any ailment, or as having any special claim to merit, or

to any peculiar advantage in mode of preparation, quality, use or effect."

If, as it was advertised and sold in 1898, and the years thereafter, Coca-Cola did not come within the classification of this law, then the finding of the Court of Appeals in the present case, now under consideration, could apply to and be true only of a time prior to the taking effect of this revenue law and not to any time thereafter.

Limiting the scope of the finding of the Court of Appeals to a time prior to that involved in the Rucker suit, the conclusions of the two cases are not in conflict. Coca-Cola prior to 1898 may have been advertised as a patent or proprietary medicine and yet not hold out subsequent thereto as of the class of "proprietary medicines, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body," and it was not of the class of medicinal articles advertised "as remedies or specifics for any ailment, etc."

Advertising After 1898.

So the record of the Rucker case as such, proves and can prove only what was decided in that case and that was that from and after the passage of the Revenue Act of 1898, Coca-Cola was not advertised and sold as a medicine. And indeed the contention

in argument by respondents hitherto has been to that effect. They have disparaged the motives of petitioner's conduct, but they have not denied, and on the other hand have asserted, the facts as found in the Rucker case. They say in their brief in the Court of Appeals, p. 156:

> "To dodge this tax, the Coca-Cola Company immediately began to cut out all references to headache and exhaustion in its advertisements, and every statement or representation therein which it thought could be construed as a holding out that the stuff was a medicine, or a remedy or specific for any ailment."

This being so, then from 1898 until 1918, when this suit was decided, for sixteen years before this suit was brought, which was in 1914, the petitioner did nothing which it thought "could be construed as a holding out that the stuff was a medicine, or a remedy or specific for any ailment."

Nor is it shown by any testimony that the petitioner did unintentionally, inadvertently or unconsciously do anything or say anything which "could be construed as a holding out that the stuff was a medicine, or a remedy or specific for any ailment."

We are predicating nothing upon the Rucker record. We objected to it when offered and it was properly excluded. It was not competent as original testimony in its entirety. If there was anything in

competent as admissions of the parties it should have been indicated. If anything was to be used for impeaching purposes it should have been selected and a proper foundation laid for its introduction.

In *City of Carlsbad* v. *Kutnow*, 71 F. R., 167, a record of certain proceedings was offered as here the Rucker record was offered, in its entirety, and when offered "complainants' counsel objected to it as irrelevant and immaterial" whereupon it was "injected bodily into the case." The court said of it, l. c. 171 and 172:

> "It covers 80 printed pages. The Circuit Court has pointed out the unsatisfactory character of such testimony where the witnesses have been neither examined nor cross-examined, and correctly holds that 'nothing short of an express stipulation to that full effect would make testimony taken in one case proof of facts in another.' The English record moreover, was obnoxious to another and fatal objection. The most cursory inspection of it shows that the powder before the registrar and the court in that proceeding was made by one Worlicek, a chemist in Carlsbad, according to a formula given him by Kutnow, and contained at least 15 per cent of genuine Carlsbad Sprudel Salt, obtained in Carlsbad by Worlicek from Loebel Schottlander, the local concessionaire of the City of Carlsbad. The completed compound, packed in tins, was shipped by the Carlsbad chemist to Kutnow in

London, who there repacked it in cartons. When it is remembered that the powder in the case at bar is concededly manufactured, not in Carlsbad, but by Kutnow himself in England, and that there is not a scintilla of evidence to show that the formula used is the same, it is manifest that the English record is irrelevant and immaterial. This court has already reprehended the practice which prevails in equity causes of stuffing the record with irrelevant testimony. *Ecaubert* v. *Appleton*, 15 C. C. A. 13, 67 Fed. 917. Undoubtedly, the circumstances under which the evidence in such causes is taken—before an examiner who has no power to exclude anything—tend to produce such slipshod and unscientific records as are frequently presented to the court; but counsel certainly owe it to themselves, their clients, and the court not to conduct the trial of an equity cause as if the most elementary rules of evidence were suspended. It has been suggested that the English record contains statements by the complainant the City of Carlsbad, or its agents, which were admissible as 'admissions against interest.' If this be so, counsel should have separately offered each of such admissions, or at most the particular affidavit or letter in which it is contended that they appeared."

The issues in the Rucker case were not the same as in the case at bar. Here we are concerned with the actual significance of the trade-mark and are to determine whether labels and advertisements were

essentially true or false and misleading, and there with the mere fact of representations made, which, true or false would justify the tax. If Coca-Cola was the veriest nostrum ever foisted upon a credulous public or the most reliable specific for certain ailments, it must in either case pay the tax.

And there were witnesses in the other case who were not witnesses here whose testimony could not possibly be competent here.

The ruling of the District Court on this question is not open to review upon the writ of certiorari, because it was not presented for consideration to the Circuit Court of Appeals by any assignment of error.

This court in *Green County* v. *Thomas' Executor*, 211 U. S., 598, l. c. 601, said:

> "The case is here upon a writ of certiorari. It has been argued by the defendant apparently upon the theory that all questions of law which were raised by it or were remotely suggested in the record were open for consideration in the Appellate Court. But we ought not to encourage such looseness of practice. * * * *The writ of error sued out by the plaintiffs and the assignment of errors which accompanied it, set forth all the questions regarding the action of the court below, of which the Appellate Court was bound to take notice.*"

So here the petition for appeal and the assignment

of errors which accompanied it, set forth all the questions regarding the action of the court below of which the Court of Appeals was bound to take notice. As the Court of Appeals took no notice of this ruling of the District Court, the ruling should not be brought up for review here.

So the Rucker record as offered was properly rejected and ought not to be considered.

If however, in spite of its various and manifest infirmities the Rucker record is admissible as the testimony of the witnesses there called as if called here, then we have the right so to use it and using it we find the evidence that even in the early days Coca-Cola was not materially misrepresented to the public. Then, as now, it did contain coca leaves and it did contain cola nuts.

It contained as much cocaine as was contained in the coca leaves used in making the preparation. This was not much. A very small fraction of a grain, 1/700, in a glass of the drink, a proportion or quantity, so little that it serves as the basis of a charge by the respondents that the trade-mark and labels were false in asserting the presence of coca and so great that it gives vivid color to the picture drawn by them of Dr. Pemberton as a "cocaine fiend" a thrall of the drug and impelled by his own servitude to bring

others, as many as he could, within its spell and impose upon them its bondage.

Use of Cola Nuts Shown.

It did contain cola nuts. As many as Dr. Pemberton found by trial and experiment he could use to advantage. The predecessors of the petitioner acquired the formula and the various individuals among them who had knowledge of it testify that it provided for cola nuts. The respondents say that their predecessors acquired from the old doctor a right to the formula and a knowledge of its terms. Counsel say in their Court of Appeals brief, p. 180, "that the formula did not call for cola nuts, and that none were ever used, seems very evident."

On the same page of the brief, counsel quote the testimony of the witness Dobbs from the Rucker case. He was also a witness in this case. In the Rucker case, as quoted, he was asked, "Where do you get the cola nuts?" and he answered, "They are imported from South Africa." Dobbs has been with the Coca-Cola business almost from the beginning in the service of the petitioner or its predecessors.

Counsel go beyond the matter of actual use and say that "the formula did not call for cola nuts." Now respondents claim that they also had the formula, got it from Dr. Pemberton, wrote it down, word for

word and item for item as he gave it from his book. They called as a witness Mr. A. O. Murphy, an associate of Mayfield in the Pemberton Medicine Company, and he testified that they made the beverage and sold it for a time under the name Coca-Cola. He says, Record p. 1282: "The color and taste of that product we were manufacturing then under the name of Coca-Cola was the same as far as I can see as that now manufactured by the Koke Company and called Koke." Then Pemberton said "he would get us up a substitute which would be identically the same thing under a different name." (Rec., 1283.)

Counsel in their Court of Appeals brief, p. 165, quote Murphy's testimony as to how he and his associates made Coca-Cola or the same thing under a different name in that early day, viz.:

> "The way we used to make that product we took the actual extract from coca leaves, it was black as tar and strong enough to knock a bull down. * * * We bought the actual leaves themselves."

Here is not a word about cola nuts and the testimony seems to support and is certainly consistent with the statement of counsel quoted above, "that the formula did not call for cola nuts and that none were ever used."

We will extend this quotation from Mr. Murphy's

testimony just a little and fill in the indicated omission:

> "Mr. Mayfield knew the formula for making the product. Mr. Mayfield was the practical man in the laboratory. Dr. Pemberton was simply directing him. The way we used to make that product, we took the actual extract from coca leaves, it was black as tar and strong enough to knock a bull down, *and then the extract from the cola nut, and mixed those two with certain preparations, with this syrup, and made it from that.* We bought the actual leaves themselves." (Rec., Vol. IV, p. 1285.)

The italics are ours, used just to note what was omitted in the quotation by counsel.

Here was the exact equivalent of Merchandise No. 5, the extracts of coca leaves and cola nuts, eliminating the cocaine. As to the use of both the plants there is no conflict in the testimony. The finding of both the lower courts is in accordance with the testimony. The Court of Appeals did not find that cola nuts were not used, but only that the caffeine in the syrup was derived mainly from tea leaves.

As to the medicinal virtues of Coca-Cola, witnesses in the Rucker case testified that it did relieve headache and nervous exhaustion.

But with the Rucker case the old advertisements passed away. Thereafter Coca-Cola was put before

the public strictly as a beverage, specifically recommended and with truth as a mild stimulating drink like tea and coffee.

Six or seven years passed before the respondent corporations came into existence. Twelve years passed before this suit was brought, and in the meantime Coca-Cola itself had been changed. The trace of cocaine was eliminated, because the general opinion was strengthening that it was a dangerous element of the habit-forming kind. The Food and Drugs Act was passed precluding its use in food and wherever it was contained in a drug or medicine its presence must be proclaimed on the label.

VI.

THE QUESTION OF CLEAN HANDS IS TO BE DETERMINED WITH REFERENCE TO CONDITIONS AS THEY EXISTED WHEN THE SUIT WAS BROUGHT.

From and after the passage of the Food and Drugs Act, June 30, 1906, and even before that time, the coca leaf used in making the "Merchandise No. 5," which in its turn was used in making the syrup, was first thoroughly decocainized. All the testimony on the subject is to that effect, and the Court of Appeals so finds, saying, "long prior to the bringing of the present suit the drug cocaine was practically eliminated." The Government in its suit against Coca-

Cola made no charge that the beverage contained cocaine. The only allegation of the presence of cocaine since the passage of the Food and Drug Act is in the last amendment to respondents' answer and in the assignments of error made by respondents on their appeal of this case to the Circuit Court of Appeals.

They say in the fourth assignment of error (Rec., Vol. I, p. 254) that plaintiff's food product contains cocaine, and they repeat this in paragraph 5 of assignment VIII (Rec., Vol. I, p. 257) and in paragraph 1 of assignment IX (Rec., Vol I, p. 258).

But in assignment I they say that "plaintiff's said product contains no coca (Rec., Vol. I, p. 251); in assignment II (Rec., Vol. I, p. 252) "that plaintiff's said product in fact contains no coca and no cola; and that it is not composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof"; and statements of like import are found in assignments III, VI and in Section 1 of assignment VIII.

One assignment, No. VIII, asserts both the negative and affirmative of the propositions. Paragraph 1 declares the product to be misbranded because the trade-mark, labels and brands suggest:

> "(1) That plaintiff's said product is a beverage, the essential characteristic ingredients of which are coca and cola, or extracts derived

therefrom, containing the principal characteristic derivation thereof, when in fact it is not; (2) that said coca and cola, or said extracts so derived, are present in said product in substantial and appreciable quantities when in fact they are not."

Paragraph 5 found on the opposing page (Rec., Vol. I, p. 257) states, *per contra:*

"That plaintiff represents to the public through its advertising and otherwise, that its said product does not contain cocaine, when in fact it does contain cocaine."

We are unable in one and the same brief in one and the same case to maintain the negative and affirmative of the same proposition and, forced to choose, we take the negative side and say that the product did not contain cocaine, and we do this because it is supported by all the testimony, by the findings of both the lower courts and by the greater number of allegations in respondents' answer and by the greater number of their assignments of error.

The Court of Appeals, however, was of opinion that the change in the product, which, as we shall show was accompanied by appropriate changes in the conduct of the business, would not open for the petitioner the doors of a court of equity, because of the earlier representations made by it

"under which representations a tremendous con-

sumption was built up, and under which large numbers of the appellee's customers still consume the mixture."

To what extent and to what time the force of the old representations persisted is necessarily a matter of inference, and cannot be determined by positive evidence. Advertising is the life-blood of modern business, and especially of business of the kind here involved. With the cessation of advertising, the business begins to fall off and soon goes out in nothing.

The petitioner certainly did not rest upon the old representations, and on the other hand did what it could by public advertisements and announcements to inform the public that Coca-Cola did not contain cocaine.

Change of Methods.

The Rucker case was decided in 1902. This marks the line between the old and the new methods of advertising. It was to the period prior to that year that the Court of Appeals had reference when it said that Coca-Cola was widely advertised as a valuable brain tonic, and ideal nerve tonic and stimulant, a cure of headache, neuralgia, hysteria and nervous afflictions, and that under these representations a tremendous consumption was built up. But thereafter as con-

ceded or rather as asserted by respondents, the petitioner changed its course of advertising and cut out "every statement or representation therein which it thought could be construed as a holding out that the stuff was a medicine or a remedy or specific for any ailment."

Progress or improvement would be impossible if a man was to be entirely limited by and to his past. It is always open to him to change for the better. And here it is conceded that petitioner did change and that twenty years ago.

The fair assumption is that by the new methods consistently pursued through two decades, the volume of its present business is determined. There is no evidence to show,—it cannot with assurance be said, that the petitioner has a single customer to-day because of representations of any kind made twenty years ago and not repeated since.

The volume of sales in 1902 was something less than 700,000 gallons. In 1913, the year before this suit was brought, it was tenfold that amount. In 1902 the amount spent for advertising was a little less than one hundred and fifty thousand dollars. The amount so spent was steadily increased from year to year and reached in 1913 the sum of one million one hundred and eighty-six thousand dollars.

Tenfold increase of advertising expenditure and a corresponding tenfold increase in volume of business, certainly suggest that the potency was in the current methods and current representations rather than in the old and the abandoned.

REMOTE PAST DOES NOT GOVERN THE CASE.

In the case of *Moxie Nerve Food Company* v. *Modox Company et al.*, 153 F. R., 487, the court considering a situation somewhat similar although by no means as strong as that of the present case, said:

> "The defense of unclean hands, to avail, must be based upon conditions existing at the time when the party applies for equitable relief. A period of more than fifteen months has elapsed since the discontinuance by the complainant of the use of the labels which were found to contain misrepresentations; and it also appears that after the adoption of the new labels the business of the company very largely increased. It is evident that much the larger part of the complainant's business is based upon the merits of Moxie as a beverage; and, while it is doubtless true that the present business was built in part upon misrepresentation, this is not, in my opinion, a sufficient reason for denying relief to a complainant who has removed the objectionable representations from its labels, wrappers, and other advertisements, and who has endeavored to conduct its business making only such repre-

sentations as are considered warranted by a substantial amount of medical opinion." l. c. 489.

In *Pillsbury* v. *Pillsbury-Washburn Company*, 64 F. R., 841, what was objected to on the part of the complainant was obviated by change in its method of business made sometime prior to the institution of the suit; just how long does not appear, and for that reason the court said that in restraining the unlawful acts of the appellants we should do no violence to the principle that "he who comes into a court of equity seeking equity, must come with pure hands."

In *Broder et al.* v. *Zeno Mauvais Music Company*, 88 F. R., 74, it was expressly determined that absolution for wrongdoing might be obtained by amendment of conduct and that in the particular case the decision would not prevent the complainants from republishing their song and by omitting the objectionable word, secure a valid copyright therefor.

In *Employers Printers Club et al.* v. *Dr. Blosser Company*, 122 Ga., 509, s. c. 69 L. R. A., 90, it was held that a former member of an illegal combination whose connection with it was severed before the filing of the suit will not be denied the protection of a court of equity against an illegal act of such combination because of his previous connection therewith. Respecting this the court said:

"It is contended by the plaintiffs in error that, conceding that the combination among the defendants was an illegal one, the plaintiff in the court below was a party to it, and cannot be heard to complain in a court of equity. It is true that at one time the plaintiff was a member of the trust, but, when the trust essayed to discipline it, it repudiated the club, and informed its officers that it would no longer affiliate with the club. It was then that the club was proceeding to punish it by calling out its employees. The maxim that one must come into a court of equity with clean hands means that he must do equity as respects the defendant's rights in the particular matter of the suit. 1 Pom. Eq. Jur. 397. 'The rule that a complainant must come into equity with clean hands does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man. The dirt upon his hands must be his bad conduct in the transaction complained of. All complainants in equity are human beings, full of faults and sin, and I doubt if there is one case in ten in which the complainant is not somewhat to blame. If the complainant does equity himself, or offers to do it (except in those cases where the rule *in pari delicto*, etc., comes in), his hands are as clean as the court can require.' *Ansley* v. *Wilson*, 50 Ga. 421. The plaintiff is not seeking to obtain any relief by virtue of his former connection with the club, and is not, therefore, *in pari delicto* with the defendants relatively to the cause of action which it brings against them. Its con-

nection with the club ceased before filing the suit, and it has repudiated the club as an unholy alliance. Even in criminal law the *locus poenitentiae* is recognized. The aggressor may repent, and abandon his felonious enterprise, and place himself in a position where he may rightfully invoke the law of self-defense in a subsequent occurrence." (69 L. R. A., l. c. 94-95.)

In *Peoria Gas & Electric Company* v. *City of Peoria*, 200 U. S., 48, the complainant had been in combination with a rival gas company to fix the price for gas and this was urged as a reason why it should be denied relief in a suit brought by it invoking the due process clause of the Federal Constitution to prevent the enforcement of an ordinance which by establishing unremunerative rates had the effect of taking private property for public use without just compensation. This court said:

"We shall assume that there was testimony from which the court justly found that the rates announced on August 1st were fixed by an agreement between the two companies. We shall also assume, though without deciding, that while that agreement was in force and the parties were acting under it, neither could recover for the gas that it furnished, nor could this plaintiff question the validity of the ordinance of September 4th. But although the stringent provisions of the Illinois antitrust law may apply to the case of an agreement between two gas companies

fixing the price of gas, and even if while the parties are proceeding under it, any party receiving gas may avoid payment therefor on that ground, and the city likewise be upheld in an ordinance establishing maximum rates which are not remunerative, yet the making of such an agreement does not subject the companies to a perpetual penalty. Parties making an agreement, unlawful by the antitrust act, may, while the agreement is in force, be subject to its penalties; but, whenever they cease to act under it, the penalties also cease. The punishment adheres to the offense, and stops when the offense itself stops." l. c. 56.

It would be hard for poor humanity, if the Statute of Limitations thus prescribed by Mr. Justice Brewer, could not be invoked by anyone.

In *Benedictus* v. *Sullivan,* 12 R. P. C., 25, 32, Mr. Justice Chitty said:

"I am not aware of any decision which establishes that where a man, lawfully possessed of a trade-mark, had many years before action brought, used it in a manner which would disentitle him if he then came to the court for protection, if before he comes to the court he has abandoned the iniquitous practice he is not entitled to relief. And, when the appeal is made, as it was by the defendant's counsel, to the maxim as to a man coming to the court with clean hands, that would seem rather to refer to the time when he does come into court to assert his civil rights

than to some bygone times in which he may have done wrong."

In *Symonds* v. *Jones*, 82 Me., 302, 19 Atl., 823, it was said:

"At the time of filing this bill none of the complainants were offending in this respect, but all seem to have been dealing fairly with the public. Of course they cannot have any damages or accounting of things done by the respondent while they were themselves offending, but, if they are now themselves doing equity, they may ask the court to require the respondent to do equity also. In *Medicine Co.* v. *Wood*, *supra*, the decision adverse to the complainant was put on the ground that the misrepresentation had been and was being continued. We find no authority deciding that a prior improper and misleading use of labels, afterwards corrected and made right, should bar a bill in equity brought for the protection of the corrected label."

In *Johnson & Johnson* v. *Seabury*, 69 N. J. Eq., 696, 61 Atl., 5, 9 Bergen, V. C., remarked:

"Without considering the propriety of such an advertisement, which perhaps was issued in anticipation of what the complainant supposed was likely to happen, it is enough to say that if it was misrepresentation, such as, if present when the bill of complaint was filed, would justify the court in withholding its aid, the advertisement complained of was withdrawn at least three years before the suit was instituted. The

refusal to hear a party who comes into court with unclean hands is based upon the conditions existing when the party applied for aid. *Worden & Co.* v. *Cal. Fig Syrup Co.,* 102 Fed. 334-336, 42 C. C. A. 383."

The right to relief notwithstanding objectionable practices upon discontinuance of them, was so far recognized in the case of *W. A. Gaines & Co.* v. *Turner-Looker Co.,* 204 F. R., 553, that the court affirmed a decree adverse to the complainant without prejudice to the institution of a new suit "whenever they shall have put an end to the misleading representations."

In *Diamond Crystal Salt Co.* v. *Worcester Salt Co.,* 221 F. R. 66, the court said (l. c. 67):

"We think it entirely equitable that the bill should be dismissed, not absolutely, but without prejudice to the right of the complainant hereafter to file a new bill, if it shall have shown that all untruthful advertising to the effect that its salt is absolutely pure and free from any gypsum has been abandoned."

The doctrine of these cases is simply that the doors of equity are just as open to the publican and sinner, if he abandons his evil ways as to the Pharisee who feels sure that he has never gone astray. And as Judge Lamm said in *Troll* v. *Spencer,* 238 Mo. l. c. 102; "The doctrine of original sin is not applied in chancery."

VII.

COCA-COLA IS NOT A DECEPTIVE NAME OF THE BEVERAGE AS IT IS NOW MADE AND HAS BEEN MADE FOR MANY YEARS PRIOR TO THE BRINGING OF THIS SUIT. ALTHOUGH COCAINE HAS FOR MANY YEARS BEEN ELIMINATED, COCA LEAVES, DECOCAINIZED, AND COLA NUTS ARE USED IN THE MANUFACTURE, AND ARE ELEMENTS GIVING FLAVOR AND CHARACTER TO THE BEVERAGE.

The Court of Appeals thus describes the situation as it was at the bringing of the suit and had been for years:

> "Long prior to the bringing of the present suit the drug cocaine was practically eliminated from the drink, and the caffeine of which it has since been mainly composed, still comes mainly, if not entirely, from other sources than the cola nuts."

In these facts the court finds "such deceptive, false, fraudulent and unconscionable conduct as precludes a court of equity from affording it (petitioner) any relief."

The facts as found by the Court of Appeals we accept as true, both those expressly found and those necessarily implied. But the conduct is, we submit, neither deceptive, false, fraudulent nor unconscionable.

The Elimination of Cocaine Did Not Make the Name Deceptive.

First as to coca. The change made in the product when "long prior to the bringing of the present suit, the drug cocaine was practically eliminated from the drink" is not what is reprobated by the Court of Appeals. That court did not mean to characterize the change as an adulteration. If so, it is in direct conflict with the ruling of this court in the Government case, 241 U. S., wherein it says, l. c. 281, that:

> "Congress certainly did not intend that a poisonous or deleterious ingredient which made a proprietary food an enemy to the public health should be treated as 'a valuable constituent,' or to induce the continued use of such injurious ingredients by making their elimination an adulteration, subject to the penalties of the statute."

Was there misbranding as a consequence of taking out the cocaine? It was a conceded fact in the Government case that there was no cocaine in the beverage and if this resulted in misbranding, the court would have said so. On the contrary the court said l. c. p. 289, that "if the name was found to be descriptive as charged there was clearly a conflict of evidence with respect to the presence of any coca ingredient." In other words there might be coca ingredients other than cocaine, and so the mere elimination of cocaine would not bar the use of the word "coca" in the name.

This is put beyond question by what is said on p. 285. There was

> "evidence on the part of the Government tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called Merchandise No. 5 (one of the ingredients) was obtained from both coca leaves and cola nuts."

The Court of Appeals was apparently of opinion that with a change in the beverage there should have been a change in its name. But why? It could be only to mark the elimination of the cocaine. Coca-leaves were still used in making Merchandise No. 5 and in full original quantity with only the alkaloid, one-half of one per cent of the weight of the leaves taken out which would materially affect it as a medicine and not at all as a food.

The Food and Drugs Act prohibited the use of any narcotic in confectionery and denounced such use as adulteration. Coca-Cola is confectionery. Cocaine is a narcotic. The act classifies it as such, for it provides as to drugs that an article shall be deemed to be misbranded "if it fail to bear a statement on its label of the quantity or proportion of any morphine, opium, *cocaine,* heroin, etc., etc., or any derivative or preparation of any such substances contained therein." There is a like provision as to food.

With the cocaine eliminated, Coca-Cola was no longer a preparation of cocaine but it was a preparation of coca leaves, decocainized, or not containing cocaine. By the Act of Congress of December 17, 1914, known as the Harrison Anti-Narcotic Act, Congress, in pursuance of its general policy respecting narcotics, prescribed certain regulations, imposing restrictions upon dealings in opium, or coca leaves, their salts, derivatives or preparations, with the proviso that "this act shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine." Here is express recognition of the fact that there are coca preparations which are drugs and coca preparations which are foods, the classification of any preparation as the one or the other being dependent upon the presence or the absence of cocaine.

From the time of the Food and Drugs Act, cocaine, in so far as it could be sold, must be sold as a drug. It could not be sold as confectionery at all. As this was public law so it was a matter of public knowledge. A preparation designated as coca being sold openly and generally at the soda fountains throughout the country, without let or hindrance from the public authorities, it would be presumed by every

one who gave it a thought that the beverage contained coca but not cocaine.

If it contained cocaine the package must declare it and it must be sold as a drug. If the package did not declare it, the omission was a misbranding, and if it were contained in confectionery that would be adulteration. The omission to declare cocaine when it was present being made by the law the equivalent of a positive statement that there was no cocaine, the label would be a false one. This being so, it must be, that if cocaine was not announced and there was none in fact, the label would be a true one.

So, in this case the label speaks the literal truth. Coca leaves are used in making the beverage, from which, however, the narcotic principle has been removed. The label by the use of the word "coca" suggests the use of coca in some form, by ifs silence as to cocaine it, implies necessarily that none is present. And this truthful legend of the label is supported by the advertising employed by petitioner to exploit the beverage. The public are told persistently and continuously that it contains no cocaine, that the coca leaves entering into its composition are decocainized before being used in the compound.

There is here, then, neither adulteration nor misbranding, and, on the contrary, a harmless beverage which is truthfully labeled, branded and advertised.

THE USE OF THE WORD COLA NOT MISBRANDING.

So much as to coca. How is as to cola in this respect? The Court of Appeals said:

> "The caffeine of which it (the beverage) has since been mainly composed, still comes mainly, if not entirely, from other sources than the cola nut."

As to the cola nut the product has not changed since the beginning. It is now as it was before the Food and Drugs Act.

No question as to adulteration is here involved. There is caffeine in the cola nuts used and more than is so found is put into the mixture. This is an added ingredient as held by this court in the Government case. And in the answer herein it is alleged to be deleterious, but there is no testimony to sustain the allegation and none was offered by the respondents that had any such purpose, even remotely, in view. On the other hand, there was an abundance of evidence on behalf of the petitioner that its beverage was a wholesome and refreshing one. The Court of Appeals made no finding and expressed no opinion adverse to the use of caffeine. On an issue of fact tendered in the pleadings and absolutely unsupported in the evidence we need not spend further time.

The ruling with respect to this by the Court of Ap-

peals signified only that the use of the word cola in the trade name was deceptive, and this because the caffeine contained in the beverage was derived mainly, if not entirely, from other sources than cola nuts. But the name has nothing to say about caffeine. It speaks only of cola nuts and cola nuts are used as is implied by the Court of Appeals. The evidence as to this is all to the same effect. Merchandise No. 5 is a compound of 380 pounds of coca leaves decocainized and 125 pounds of cola nuts in 900 gallons of a less than twenty per cent dilution of alcohol. (Rec., 911.)

The Court of Appeals holds in effect that cola nuts, to the public mind, signify caffeine and caffeine obtained from the nuts, and concludes that as here the caffeine is not derived principally from the cola nuts used, there is a misnomer of the beverage. If we assume anything with respect to the general opinion on this subject we must assume that it is correctly informed and so is advised that caffeine may be derived from many sources, tea, coffee, cola nuts and other plants and herbs and that it is usually gotten from tea for economic reasons and that from whatever source it is obtained, it is the same identical thing, in nowise distinguishable because of its origin. And so if the public think that cola is the equivalent of the caffeine that is found in the nut and they buy

the beverage because they want a caffeine beverage and the name cola suggests such a beverage to them, the answer to it all is that when they buy Coca-Cola they get what they want. And so there is in the case no element of fraud or deceit, no more than there is in the sale of salts as Epsom, although the salt comes from the Mammoth Cave in Kentucky or in the sale of Stilton cheese, which Dr. Doran in his Table Traits informs us is not made at Stilton. In those cases, as here, the purchaser wants the article because of its inherent qualities and not because of its derivation.

Coca leaves and cola nuts are used in making the compound, the coca leaves being decocainized, and this is the suggestion of the label and is the truth. And so it is as to the petitioners' advertising literature which commends the beverage as a wholesome one, refreshing and stimulating as tea and coffee are so.

The real defense in this case is a denunciation of the beverage itself, although in the conduct of their business the respondents yield to it the sincere flattery of imitation.

They say that Merchandise No. 5 contributes nothing of any value to the beverage in the way of taste or flavor, it being nothing more than a mass of inert matter in a weak dilution of alcohol. This was re-

peated over and over again in the brief in the Court of Appeals, as for example, p. 195:

> "Plaintiff attempts to justify its fraud in palming off as 'Coca-Cola' a preparation containing nothing more from either the coca leaf or the cola nut than is supplied by this 'Merchandise No. 5,' by pretending that the minute traces of inert substances thus obtained from the coca leaf and the cola nut impart a taste and flavor that are essential to its product, the theory evidently being that, if it can be shown that these infinitesimal particles of tasteless and odorless substances perform some function in the preparation other than lending a weak support to the statement that the article sold is 'Coca-Cola,' then plaintiff is justified in continuing to palm off its preparation as and for a preparation of coca and cola."

So the final issue is one as to taste and flavor. We know that in articles of food and drink there are experts in taste, especially in teas, coffees and wines, who discover differences imperceptible to the ordinary palate, according to which none the less, the teas, coffees and wines are graded commercially and high prices are paid for peculiarities of flavor which the average man does not recognize at all.

Respondents beg the question throughout. They assume that there is nothing for any purpose in coca except cocaine and nothing in cola except caffeine.

So the decocainized leaves can add nothing to the beverage and neither can the crude cola nuts, the caffeine being almost entirely added in pure form. So we might say that tea and coffee are the same, because the active principle in each is the same, everything else being inert matter. Tea would be the stronger, because it contains much more caffeine, but reduce it sufficiently by the addition of hot water, and the weak tea would become as strong coffee. So it would seem and so it would be if the assumption were true. But the fact is otherwise. Caffeine is caffeine, in the tea leaf and the coffee bean, but tea in the urn and coffee in the pot are not the same. In the matter that respondents would call inert there is a subtle potency of taste and flavor which most can appreciate and which strongly determines the preferences of men for the one or for the other.

Here the respondents claim that they acquired the formula from Dr. Pemberton and the right to the very trade-mark itself. The formula they say they used, the trade-mark without relinquishing they did not assert out of deference to the unwarranted claim of Dr. Pemberton. Their Koke is the same as Coca-Cola, they say, and it comes not with good grace from them to disparage that which they nearly or exactly simulate and the good will of which they seek

to appropriate, although it was acquired under the very trade-mark they would destroy.

Pertinent here is what the Court of Appeals said in *Samuel Bros & Co.* v. *Hostetter Co.,* 118 F. R. 257, l. c. 260, viz.:

> "The argument that it is a quack medicine and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula and by unfair trade sell the simulated article as and for the genuine."

As to taste, it is easy to differ and idle to dispute. People differ even as to the existence of a particular taste, to say nothing of its contributing elements. Job, Chap. 6, verse 6, inquires in a tone of negative determination, "Can that which is unsavory be eaten without salt? or is there *any* taste in the white of an egg?" And he closes the chapter with the further inquiry, "Is there iniquity in my tongue? Cannot my taste discern perverse things?"

Coleridge must have been exceptionally endowed in the matter of smell, if he did in the City of Cologne count "two and seventy stenches, all several and well defined," but then he had an entire city as the field of his operation, and a city devoted largely to the production of smells.

Savor is something more subtle and not so simple. It depends somewhat upon smell and somewhat upon taste. It is neither the one nor the other, but a composite of both, with very often help from appetite and imagination.

Brillat-Savarin, the classic on taste as here involved in his Physiologie du Gout, Bouton's Edition, p. 57, says:

> "The number of savours is infinite, as each soluble body has a special savour which does not entirely resemble that of any other.
>
> Savours are also modified by their simple, double or multiple aggregation; so that it is impossible to classify them, from the most pleasant to the most disagreeable, from the strawberry to the colocynth. Thus every one who has yet tried to do this has almost failed.
>
> This result ought not to amaze us, for, it being granted that endless series of simple savours exist, which may be modified by their reciprocal union, in any number and in any quantity, a new language would be necessary to explain all these results, mountains of folios to describe them, and as yet unknown numeric characters to label them."

The Encyclopedia Britannica in its article on Taste says:

> "Taste is often associated with smell (*q. v.*), giving rise to the sensation of flavour, and we

are frequently in the habit of confounding one sensation with the other. * * * Taste may be educated to a remarkable extent, and careful observation—along with the practice of avoiding all substances having a pronounced taste or having an irritating effect—enables tea-tasters and wine-tasters to detect slight differences of taste, more especially when combined with odor so as to produce flavour, which would be quite inappreciable to an ordinary palate."

And Starling, in his Human Physiology, p. 588:

"Most of our so-called tastes should rather be designated flavours and are dependent, not on the gustatory nerves, but on the sense of smell. When the olfactory sense is destroyed very little difference is to be perceived between an onion and an apple. The epicure with a fine palate has really educated his sense of smell and would be but little satisfied with the simple sensations derived from his four sets of gustatory end-organs."

H. L. Hollingsworth and A. T. Poffenberger, Jr., in The Sense of Taste, say, p. 43:

"In a general way it is well known that exceedingly weak solutions of many substances are sufficient to provoke sensations of taste. It is also known that weak tastes which some individuals are able to detect or to recognize correctly go quite unobserved by others. The same thing is true of differences between tastes. The connoisseur is sensitive to minute differences in

the flavor of wine, tobaccos and sauces. Through practice the expert taster of these substances acquires a skill which is quite incomprehensible to the inexperienced."

And on p. 44:

"Numerous investigators have concerned themselves with the task of discovering the weakest solution of various substances that will provoke their respective sensory qualities. The main results of these studies have been the demonstration of two facts, namely, that exceedingly weak stimuli may arouse sensations of taste and that this minimum solution varies greatly in amount according to the substance which is in question."

The formula for Coca-Cola now in use calls for a simple mixture of sugar and water which makes up 95.27 of the syrup. The remaining less than five per cent is made up of caffeine, phosphoric acid, caramel, lime juice, glycerine, flavoring oils and Merchandise No. 5. (Rec., Vol. II, 422.) Of the ingredients added to the simple syrup, Merchandise No. 5 is something more than one-fourth. As consumed this compound is diluted with six parts of water. But respondents say that the Merchandise No. 5 contributes nothing, and is mere inert matter, in nowise affecting taste or flavor.

And yet one thing is true, Dr. Pemberton succeed-

ing in making a distinctive beverage to which he gave the name of Coca-Cola. Every page of the record proves that. It is not ordinary soda water, or ginger ale, or root beer, or yet moxie, or sarsaparilla. The mere taste of it will demonstrate that. It has continued in popular favor for more than thirty years as shown by its continuously and enormously increasing use and by the many imitations of it on the market. It has a taste and flavor of its own. It is admitted that people who ask for Coca-Cola want the beverage made by the petitioner and not that made by anyone else. The contention of respondents is only that a call for Koke or Dope does not necessarily mean a call for Coca-Cola. The imitating beverages are made, of course, to resemble as much as possible the taste and flavor of the original, and witnesses on both sides testify to a certain similarity between Coca-Cola and its imitations and all discriminate between drinks of this character and other soda fountain beverages.

The testimony in the case as to the taste and flavor of the beverage is just what we might expect.

Some chemists were examined on both sides, who testified to analyses made by them of the beverages made by petitioner and by respondents. But they were not really experts on taste. The crucible in which that is to be determined is the palate and these

men were not as cultivated in that way as the lay witnesses.

But nothing is proven against Coca-Cola, nothing to show that Merchandise No. 5 does not affect the taste of the beverage, because some one cannot tell the difference whether the merchandise is in or out of it. Some of the witnesses thought they could distinguish between Coca-Cola and Koke and others did not think they could. One taste is keener, more discriminating than another. If there is a difference apparent to any taste, then the difference exists. The alert and apprehensive stag "snuffs the tainted gale," although the hunter may be out of view and a mile away.

Martin (Rec., 344) can tell the difference between Coca-Cola and Afri-Cola when his liver is not out of order. Heath, p. 415, could not tell any difference in the beverage with and without caramel. James, p. 462, things that Ala-Cola does not taste the same as Coca-Cola. "I did try it and served it to my customers and tried it myself." Elliott, p. 563, says his people "are all satisfied when we give them Coca-Cola, we never hear any complaint." The policeman, p. 600, tasting both said Koke and Coca-Cola were the same. Cain, p. 627, says that the Koke people told him "to go out and sell it to the trade as Coca-Cola. Yes, sir; that it was like Coca-Cola in taste,

that it was made by the same formula." Rogers, p. 737, tells of a test made to settle a bet, in which the man won who said he could distinguish between Koke and Coca-Cola. Brown, p. 764 says as to the taste of the two beverages that "there was a difference and I believe anyone could detect the difference." Skillen, p. 799, doesn't think he "would be qualified to taste it" and say whether "it was Coca-Cola or not." English, p. 804, doubts if he "could tell them (Koke and Coca-Cola) apart."

Dr. Caspari, examined as a chemist on the part of the petitioner says (Rec., 910 *et seq.*):

> "The balance of the substance left in the coca leaf, after the alkaloids have been extracted, have the characteristic taste of coca leaf, with one exception, perhaps. It might not be quite so bitter as before. * * * If you use this Merchandise No. 5 it is quite a pronounced taste. * * * You ask the direct question whether or not the presence of Merchandise No. 5 in the quantity stated in 1,250 gallons of 'Coca-Cola' syrup, adds any appreciable flavor to the drink whatsoever; it certainly does and the evidence of that is this: That two bottles were sent me, one of which contained 'Coca-Cola' syrup made with No. 5, and one without No. 5 and I was asked to see whether I could distinguish any difference between them in taste and odor, and there was a very marked difference, a pronounced difference. Anybody could tell the difference right off." (Rec., 915.)

Dr. Wesener, another chemist called by petitioner, testified (Rec., 928-29):

"From a strictly chemical and medicinal standpoint, the characteristic property of the coca leaf is removed in making this Merchandise No. 5, but not from a food standpoint or flavor standpoint. When I say food standpoint, of course, I include in that condiments and 'Coca-Cola,' that is, coca leaves minus the cocaine, still would be considered as a condiment. Coca leaves would not have the same taste and flavor with the alkaloids removed as they have with the alkaloids in them—they might have the same taste and flavor, but there would be one essential difference that the anaesthetic character of the coca leaf would be removed. I would say that the taste and flavor would be pretty much the same excepting that probably it would be a little less bitter and it would not have this local anaesthesia or numbness. I would say that there would be very little difference in flavor between 'Coca-Cola' made from Merchandise No. 5 in which the alkaloid had been extracted and made from Merchandise No. 5 in which the alkaloid had not been extracted from the coca leaves because there is very little Merchandise No. 5 used, and, therefore, the small percentage of cocaine still left in Merchandise No. 5 would be negligible as to taste. The fact of the business is that the quantity of Merchandise No. 5 in the drink at all is very little; it is less than two per cent, as I understand it. I should guess there is about

eighteen gallons of the No. 5 to twelve hundred and fifty gallons of the syrup. I would not want to be certain about that unless I could look up my old records on the subject. I have examined 'Coca-Cola' syrup made with Merchandise No. 5 in it and made without Merchandise No. 5 in it, and there was quite a difference as to taste. The Merchandise No. 5 gave the syrup a character which was very distinct, and, without it, it did not seem to have the same flavor, to my taste. I had no trouble at all in telling one from the other when they were put before me as unknown mixtures. I did not know what was in either one of the bottles excepting that I know one was supposed to contain Merchandise No. 5 and the other was to be without Merchandise No. 5."

The foregoing were petitioner's witnesses. We will now cite some witnesses called by the respondents.

Referring to various other drinks similar to Coca-Cola, Wheeler, p. 970, says "there is very little difference in the taste of these cola beverages compared with the taste of Coca-Cola." Freeman, p. 974, thinks he could not distinguish by taste the various drinks. Zimmerman, p. 979, thinks the taste of Koke and Coca-Cola "very much alike; the ingredients were almost the same as the original Coca-Cola of today." Quinn says the cola drinks "may all have a different taste but I do not see any difference to amount to anything, the same general taste." Hop-

per, p. 997, says "some two or three drinks are pretty nearly exactly like Coca-Cola. I have never tasted any that tasted like Coca-Cola except Koke." Wayman, p. 1014, says "there is some little difference in taste, of course." Embrey, p. 1022, says that Afri-Kola "was not the flavor Coca-Cola had. That was the flavor they were getting at, and did not get, that was the reason it did not go." Dr. Null, p. 1063: "The taste of these different cola drinks compared with the taste of Coca-Cola, is very similar, there is some difference in it." Adam Diehl, p. 1084: "All cola drinks have the same taste with some little difference." Fletcher, p. 1093: "I think that the fluid extract of the cola and the coca in it give it a peculiar aromatic flavor and taste that nothing else does." Davis, p. 1102, thinks that the taste of many of these cola drinks compared with Coca-Cola in many cases is almost indistinguishable, and in other cases there is a noticeable difference. Fuston, p. 1117: "Some people can tell the difference and some cannot." Booth, p. 1171: "Some people could not tell the difference, but I could and I have seen lots of people that can." Goody, p. 1795, made trial with his patrons to determine which they really preferred, Koke or Coca-Cola.

> "I simply made up a drink from Coca-Cola syrup and another drink from Dope syrup and gave the two out and asked the customer which

he liked the best. The customer was not in any position to know what he was drinking. I done this in making those comparisons when they come in and called for a drink, and I have just simply for my own benefit, as I wanted to find out which was the better of the two, to see whether he could tell any difference between the two. As a rule, they could tell, they generally expressed the preference as to which they liked. Not always would they say the product of the Southern Koke Company, but usually."

We might extend these quotations from respondents' testimony to great length. The witnesses are proprietors of and attendants upon or patrons of soda fountains, and there is substantial accord among them that these drinks are something very different from other fountain beverages and that they differ in taste and flavor from each other.

Dr. Meserve, a chemist called by respondents, p. 2465, says that he has compared the aroma of the Coca-Cola syrup and the aroma of the flavors from coca leaf, "and I noticed no resemblance."

The flavor of Coca-Cola syrup is, of course, a composite one, and is quite different from that of the coca leaf, for sugar, phosphoric acid, cola nuts, caffeine, glycerine, lime juice, oil of cassia and other essential oils have been added to and thoroughly blended with it.

Dr. Kessler, another chemist, pp. 2466-7, thinks the taste of Coca-Cola "is essentially the taste of lime juice." He thinks the coca leaf is of little significance in the taste and flavor. "Coca leaf is similar to the tea leaf in a great many respects. It is about the same size and color of the tea leaf. It contains not much of any flavoring substance. It has not much odor or flavor."

On the other hand, Dr. Simonson, another chemist called by respondents, p. 2504, found so much taste and flavor in the coca leaf that the mere method of making Merchandise No. 5 had a marked effect upon the taste and aroma of it. The taste of coca leaf was but slight when the decocainized leaf was used in making the syrup.

Murphy, the early associate of Mayfield, p. 1285, evidently thought coca leaves had an aroma, as he speaks of the extract of coca leaves as being "black as tar and strong enough to knock a bull down."

Mayfield, Sr., p. 1646, who says he secured the original and genuine Coca-Cola formula from Dr. Pemberton, evidently thought that the coca leaf had a well defined taste, for he says that when he discontinued the use of coca leaves, in order to get rid of cocaine altogether, "we added something in lieu thereof, that has practically the same flavor as the

coca leaf. We added Imperial China tea, flavoring extract."

Here is the explicit statement of Mayfield that the coca leaf in its natural state gave to the beverage a distinct flavor and so when he eliminated the leaf entirely as a means of getting rid of the cocaine, he added Imperial China tea in lieu thereof because it had practically the same flavor.

The petitioner did not do this, but respondents say, Court of Appeals brief, p. 18:

> "To avoid having to print on its labels a statement of the quantity or proportion of cocaine contained in Coca-Cola plaintiff decided to revise its product and eliminate the cocaine."

Was the savor of the coca leaf or any of it in the cocaine? Was that savor gone when the cocaine was gone? Who could tell as well as those who used the beverage?

Here is a record containing the testimony of more than three hundred witnesses, all testifying about Coca-Cola in some way, and nearly all of them dispensers or users of drinks similar to Coca-Cola, and particularly of the beverage made and sold by the petitioner as Coca-Cola. These people should know, better than chemist or counsel, whether by the elimination of the cocaine, the beverage had lost its savor

or whether that had been impaired in any way. Of them all there is not one who speaks of a change in taste or flavor from what it was originally. Not one of them says that "Coca-Cola is not what it used to be." The witnesses cover the entire period from the origin of the drink to the time of trial. The beverage is always spoken of, no matter to what date reference is had as one and the same thing. The matter of change was not so much as mooted in the examination of a witness called from either side of the soda fountain. Taste and flavor are matters of which consumers can judge. They may not know to what they are due, but they know what they are like, and if they are changed in any material degree they become aware of the fact. That of all the dealers and consumers called to the witness stand, not one had noted a change, that public approval continues and public patronage increases notwithstanding the change in the formula is conclusive evidence that the change did not impair taste or flavor and that for every purpose of a wholesome and palatable beverage, the decocainized leaves serve every use that in the early days was served by the leaves in their natural state, and that the name adopted in the beginning has not been forfeited by the change.

VIII.

THE NAME COCA-COLA IS A VALID TRADE-MARK AT COMMON LAW.

From the foregoing it is apparent that the word Coca-Cola, when it was first adopted by petitioner's predecessors, was a new word which had never been heard of before. It was an original, unusual and alliterative expression selected for the purpose of identifying the distinctive beverage which they had succeeded in perfecting. It was not to be found in any dictionary. It was not a part of the language. It had never previously been used. It was not descriptive in the sense that it described anything. If it conveyed a suggestion of the presence in the beverage of coca leaves and cola nuts or some substance derived from them, the suggestion was and always has been entirely truthful.

It has never been held to be an objection to the validity of a trade-mark that it suggests some quality of the merchandise to which it is applied. *In re Burroughs, Wellcome & Co.*, 21 R. P. C., 217, (1904), 1 Ch. 736. Lord Justice Vaughan Williams said:

> "A fancy word is not generally chosen haphazard. The mere fact that the train of thought in the inventor's mind can be traced back, is not fatal to the word."

As Lord Macnaghten observed *in re Eastman Photographic Materials Co.* (1898), App. Cases, 571, 15 R. P. C., 476, 486:

> "If it is new it is no objection that it may be traced to a foreign source or that it may contain a covert or skillful allusion to the character or quality of the goods."

In its inherent character the name Coca-Cola was such as to be capable of exclusive appropriation. Before it was used as the trade name of petitioner's beverage it had no meaning. Since its application to petitioner's beverage it has had a definite meaning,—petitioner's beverage and nothing else. And to give petitioner an exclusive right in it hurts no one. No one needs this unusual combination to describe anything. The makers of similar beverages have not needed it for any purpose of description, certainly none has used it. In addition, the evidence in this case plainly shows that by association with petitioner's product, the name Coca-Cola for years has performed completely the function of a trade-mark, because both originally and by association it is distinctive of the goods of the petitioner.

To adopt this court's language, *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, p. 546:

> "The trade-mark must, therefore, be distinctive in its original signification, pointing to the

origin of the articles, or it must have become such by association."

In the present case it is a conceded fact, accepted by parties, witnesses, counsel and the lower courts, that when the word Coca-Cola is spoken, the petitioner's product only is meant. Therefore, the name Coca-Cola has become, in the language of this court, distinctive by association.

And even if the word Coca-Cola originally had been completely and exhaustively descriptive, if by user it had become so inseparably connected with petitioner's goods as the evidence in this case shows that it has been, it would be protected against unfair use by others upon the principle laid down in the Camel Hair Belting and like cases.

Reddaway v. *Banham,* 1896 A. C., 199, 13 R. P. C., 224, which was expressly approved by this court in *Elgin National Watch Company* v. *Illinois Watch Case Company,* 179 U. S., 665, and its doctrine stated as the law of this country in this court by *French Republic* v. *Saratoga Vichy Co.,* 191 U. S., 427, 435; *Powell* v. *Birmingham Vinegar Brewery Co.,* 1897 A. C., 710, 14 R. P. C., 727; *Thompson* v. *Montgomery* (1891), A. C., 217, 6 R. P. C., 404, 8 R. P. C., 326, 365; *Wotherspoon* v. *Currie,* L. R., 5 House of Lords, 508, 27 L. T. (N. S.), 393; *Baglin* v. *Cusenier,* 221 U. S., 580; *Jacobs* v. *Beecham,* 221 U. S., 263.

Therefore, whether the name Coca-Cola should be regarded, as it certainly is, as a valid, technical trade-mark, and hence by presumption identifying the goods of the petitioner, or whether instead of the presumption, reliance is placed upon the fact of the identification of petitioner's beverage by means of it, this record shows that the word Coca-Cola does in fact, identify the goods of the petitioner only, so that, whichever alternative is adopted, the result is the same—Coca-Cola is a name unmistakably indicating petitioner as the origin of the merchandise to which the word is affixed, and hence it is a trade-mark.

The name Coca-Cola is, as stated by Mr. Justice Clifford in *McLean* v. *Fleming*, 96 U. S., 245, 254,

> "a name * * * adopted and used by a manufacturer to designate the goods he manufactures * * * to distinguish the same from those manufactured * * * by another to the end that the goods may be known in the market as his—and to enable him to secure such profits as result from his reputation for skill, industry and fidelity, so that purchasers of his goods having that mark * * * know them to be of his manufacture."

Coca-Cola, under this record, is such a word, and in the language of Mr. Justice Strong in *Canal Co.* v. *Clark*, 13 Wall., 311, 323, it is a word, which either

by itself or by association, points distinctively to the origin or ownership of the article to which it is applied, or if we apply the doctrine of secondary meaning as expressed by Mr. Justice Pitney in *Hanover Star Milling Company* v. *Metcalf*, 240 U. S. 403, the result is the same (410):

> "The reputation of the mill is bound up with the reputation of Tea Rose flour, and 'Tea Rose' in the flour trade in the territory referred to means flour of the Hanover Company's manufacture."

(412):

> "So that in the flour trade in that territory, the mark 'Tea Rose' had come to mean the Hanover Company's flour, and nothing else."

And concluding (424):

> "* * * 'Tea Rose' (shown to have acquired a secondary meaning), and with the distinctive wrapping, both indicative in that market of complainant's flour. Complainant is thus shown to be entitled to an injunction against Metcalf, irrespective of its claim to affirmative trade-mark rights in that territory."

In the present case there is no territorial limitation, because the sale of petitioner's beverage and its identification by the name Coca-Cola is nation-wide.

The overwhelming weight of the testimony

is to the effect that the name Coca-Cola has always identified the petitioner as the producer of the beverage. There is a single, slight break in the perfect accord of the evidence. Murphy and Mayfield testify that the Pemberton *Medicine* Company had bought the Coca-Cola business of Dr. Pemberton and for two months or so made and sold the beverage as Coca-Cola. Whether this claim of title has any warrant in fact, we need not stop to consider. The lower courts found against it. In any event whenever it was that they came into this field of production they left the name Coca-Cola to the petitioner to designate its product and took for themselves another name or other names. They insist, and it is the very gist of their defense on this point, that the petitioner always designated its product by the full formal name of Coca-Cola. And they assert that they undertook to acquire for their product a distinctive name.

For a time the petitioner's predecessors were alone in this field and of course during that period, just what that was is not shown, it was recognized as the producer of Coca-Cola. The petitioner itself acquired the business in 1892 and has carried it on until now. Ever since 1892 Coca-Cola under that name has been made and sold only by *The* Coca-Cola Company. Others, many others, have made and sold what they say is the same thing, a beverage like Coca-Cola,

as good as Coca-Cola, indistinguishable therefrom and made after the same formula, cola drinks or coca drinks, but no one has made, sold or advertised his production under the name Coca-Cola. Always something else, more or less imitative, but never identical. So we have had Coca-Nola, Nova-Cola, Ala-Cola, Chero-Cola and perhaps fifty others. Never, unless for two months, in the year 1888, have we had Coca-Cola except as made, sold and advertised by *The* Coca-Cola Company. As the necessary result of this association and this exclusive use of the name, whether in the early days, when the petitioner was alone in the field or in the later days when competitors were numerous and aggressive, it is manifest that the name Coca-Cola came to designate only the beverage made and sold by petitioner and this without limitation and country wide.

Whether, therefore, we consider Coca-Cola as a trade-mark originally, or as having become such by association or as having acquired a secondary meaning, the name Coca-Cola, from the beginning of its use in 1886, and continuously since has always identified only the product of *The* Coca-Cola Company. Therefore, for more than thirty years it has performed the function of a trade-mark and is petitioner's trade-mark in fact.

There is no inconsistency between this view and the decision of this court in *United States* v. *40 Barrels and 20 Kegs of Coca-Cola,* 241 U. S., 265. This court there held that the name Coca-Cola imported the presence of coca and cola ingredients. This record shows that the product contains both. The name Coca-Cola, therefore, means: (1) The product of petitioner, which (2) contains coca and cola ingredients. The name Coca-Cola is identifying in fact and is primarily a trade-mark, and in its subordinate suggestion is truthful.

IX.

THE REGISTRATION OF THE TRADE-MARK COCA-COLA CONFIRMS PETITIONER'S EXCLUSIVE RIGHT IN IT.

The identification of petitioner's beverage by the name Coca-Cola and the legal consequences which follow from this fact are confirmed by statutory law by its registration in the Patent Office under the Acts of 1881 and 1905. Since there had been actual and exclusive use for the requisite period, the registration under Act of 1905 was under the so-called ten-year proviso. This court held in *Thaddeus Davids Company* v. *Davids,* 233 U. S., 461, that a mark so registered is entitled to the same protection as any other trade-mark. See also as to the effect of registration under the Act of 1881, *Baglin* v. *Cusenier,* 221 U. S., 580.

There is, therefore, under the facts of this case, a good will of great value symbolized by the name Coca-Cola, which is a word pointing unmistakably and exclusively to petitioner as producer, which identifies and distinguishes both as a matter of presumption and as a matter of fact, and which has been registered since 1892 under the Act of Congress. This makes the name Coca-Cola a valid trade-mark at common law and under the statute.

In Conclusion.

The name Coca-Cola was first applied to and made to signify a beverage which Dr. Pemberton in 1886 had just begun to make. A year or so later he sold the business with the formula, trade name, labels and good will to others who continued the business and in their day the same name signified the same beverage as made by them. And so with their successors until in 1892 it came to The Coca-Cola Company which has continued it down to the present time. Meanwhile many competitors have come into the field with similar beverages, but none of these offered his product to the public under the name of Coca-Cola. They may some of them have infringed upon the name, but none of

them adopted it in terms. For thirty years and more in lineal succession the name has meant this beverage made by a particular producer, either the petitioner or a predecessor in title. It never meant a beverage of any kind made by any other person. From the humble beginnings of the business, throughout the various stages of its expansion in the volume of production to millions per annum and the extension of its market from a single town in Georgia to every state in the Union and to foreign countries the name has identified this particular product with the one producer. For the last twenty-eight years the identification of the product with the producer has been emphasized by the identity of the names of each. Everybody concerned understands that what is on the market under the name of Coca-Cola has been made by The Coca-Cola Company only. In all the history of trade-mark litigation there cannot be found an instance of closer identification, through a name, of the maker with the thing made. It is now proposed to outlaw the name under which the business has been developed and to expose its good will to the rapacity of whomsoever may venture to encroach upon it. And the justification of the outlawry is nothing more than a difference of opinion as to taste and smell and the disparagement of the product as not warranting

its name by one who imitates as closely as he can, alike the product and the name.

Respectfully submitted,

HAROLD HIRSCH,
FRANK F. REED,
EDWARD S. ROGERS,
FREDERICK W. LEHMANN,
CHARLES E. RUSHMORE,
Counsel for Petitioner.

Supreme Court, U.S.
FILED
MAR 23 1920
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. [redacted]101

THE COCA-COLA COMPANY,
Petitioner,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, THE KOKE COMPANY OF ARKANSAS,
Respondents.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SCHEDULES I TO IX TO THE BRIEF FOR THE PETITIONER.

HAROLD HIRSCH,
FRANK F. REED,
EDWARD S. ROGERS,
FREDERICK W. LEHMANN,
CHARLES E. RUSHMORE,
Counsel for Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX TO SCHEDULES.

PAGE

SCHEDULE I. The name Coca-Cola identifies petitioner's product only 1

Typical extracts from the testimony..... 1

SCHEDULE II. The use by the public of the abbreviation Coke and the nickname Dope and their application to Coca-Cola..... 6

Extracts from the record showing the word Coke to be an abbreviation of the name Coca-Cola and Dope a nickname for Coca-Cola and establishing that these words are short names used by purchasers in ordering and designating Coca-Cola.... 6

Admissions made by the witnesses called by the respondents that the words Coke and Dope are commonly used nicknames for Coca-Cola. Quotations from the testimony 35

Trade name experts.....43-44

Tabulation of the expert testimony on nicknames: Observation, interviews and tests 45

SCHEDULE III. The red color of the Coca-Cola barrel is distinctive and a means by which Coca-Cola is identified. Extracts from the record which establish this fact..... 72

SCHEDULE IV. The distinctive color and taste of Coca-Cola. Extracts from the testimony.... 77

SCHEDULE V. Respondents' salesmen in attempting to sell their product hold out as an inducement to purchase that more money can be made in its sale than in the sale of Coca-Cola, that it can be sold as and for Coca-Cola and the public cannot tell the difference. Extracts from the testimony establishing that these representations are deliberately, continually and systematically made 79

Admissions of respondents' witnesses that respondents' salesmen suggested passing off 99

SCHEDULE VI. Respondents' product has been systematically passed off on the public as and for Coca-Cola. Extracts from the testimony.. 102

Admissions of dealers handling respondents' product and called as witnesses by them demonstrate the deliberate, and systematic passing off of the respondents' product for Coca-Cola. Extracts from respondents' testimony 104

SCHEDULE VII. Respondents' officers and promoters knew that Coke and Dope were nicknames for Coca-Cola when they started in business and their intent was to infringe the rights of petitioner and to compete unfairly. They deliberately imitated the color of the distinctive Coca-Cola barrels and took a specimen of the Coca-Cola labels to a printer as copy for the Koke labels. Extracts from the testimony 120

SCHEDULE VIII. The fiction of the use of the word Koke since 1888 by respondents and their predecessor Mayfield 134
Comments on the testimony of J. C. Mayfield 137
Parallel columns of his contrasted statements 138
The "Dear Judge" letter 140
The Rice record 142
First use of Koke 151
June 1, 1909, as shown in applications for state registration 151
Manufacture of Koke in Birmingham and Nashville 153
Reasons for adopting Koke 155
Formula 155
Advertising of Koke 157
Manufacture of Koke in St. Louis and Nashville 158
Koke in Birmingham and the labels used there 159
The slip with Koke on it in black, block letters 165
Celery Cola is what was made up to 1909 .. 166
No documentary evidence produced by respondents in support of their claim 171
The Pogue letters 173
F. T. F. Johnson's letter to J. C. Mayfield suggesting the fabrication of a defense in

other litigation in which he was interested (Exhibit 13) 178

Mayfield's letter of transmittal to Pogue (Exhibit 12) 183

SCHEDULE IX. Discussion of respondents' contention that the words Coke and Dope are used as names for soft drinks generally..... 188

SCHEDULE I.

The Name Coca-Cola Identifies Petitioner's Product Only.

The following are typical extracts from the testimony:

NICK C. CHOTAS (Rec., 447):

"I have been in business for six years. I have dispensed during all that time soda water and 'Coca-Cola.' Candler is the maker of 'Coca-Cola.' Sure, I have heard of the Coca-Cola Company. Yes, sir; when I speak of 'Coca-Cola' I mean the drink that is advertised all around. I have known 'Coca-Cola' about ten years."

F. M. GREEN (Rec., 450), in business for twenty years:

"The Candler Company of Atlanta, Georgia—the Coca-Cola Company—makes Coca-Cola. Yes, sir; that is the drink which is generally advertised all around. I have handled it about 16 or 18 years. * * *"

I. L. JAMES (Rec., 460):

"Coca-Cola is made in Atlanta by the Coca-Cola Company. Yes, sir; that's the drink advertised extensively all over the country and in Atlanta. I guess I have known this drink 'Coca-Cola' about 17 years."

ALEXANDER CRUICKSHANK (Rec., 463), five stores in Atlanta, in business 11 years:

"Yes, sir; we dispense 'Coca-Cola.' The Coca-Cola Company, of Atlanta, is the maker of 'Coca-Cola.' Yes, sir; I have seen Coca-Cola advertising. The conspicuous feature of it is the trade-mark. By that

I mean the script, yes, sir; and the name 'Coca-Cola.' I have known Coca-Cola ever since I have been in Atlanta, about 17 years."

CHARLES KINGSBURY (Rec., 465), six years in business:

" 'Coca-Cola' is manufactured in Atlanta by Asa G. Candler—the Coca-Cola Company. Yes, sir; that is the drink so extensively advertised."

F. M. SMITH (Rec., 468):

"Yes, sir; by Coca-Cola I mean the product that is so extensively advertised."

W. R. MILLICON (Rec., 470):

" 'Coca-Cola' is manufactured in Atlanta by the Coca-Cola Company. Yes, sir; that is the drink that is advertised generally around, that I refer to as 'Coca-Cola.' I have known 'Coca-Cola.' I have known 'Coca-Cola' about ten or twelve years, I reckon."

DR. J. D. T. LAWRENCE (Rec., 470), in business ten years:

"Yes, sir; we dispense 'Coca-Cola.' Mr. Candler makes 'Coca-Cola'—I believe they call it the Coca-Cola Company."

DR. F. F. LANGENFELDT (Rec., 473), in business eight years:

"The 'Coca-Cola' people here in Atlanta make 'Coca-Cola.' "

DAVID G. WISE (Rec., 474):

" 'Coca-Cola' is manufactured in Atlanta by the Coca-Cola Company, I think is the name of it. Yes, sir; that is the drink that is advertised extensively."

W. R. STOVALL (Rec., 476):

"Yes, sir; I dispense 'Coca-Cola.' The Coca-Cola Company is the maker of 'Coca-Cola.'"

CHARLES ALEXIORE (Rec., 477):

"Yes, sir; that drink 'Coca-Cola' is manufactured here in Atlanta by Asa Candler. The name of his company is the Coca-Cola Company."

J. F. REDDING (Rec., 478):

"'Coca-Cola' is manufactured in Atlanta by the Coca-Cola Company. * * * That is, the drink that is advertised so extensively. * * * That is the drink I understand when 'Coca-Cola' is referred to."

CHARLES B. GIARDINA (Rec., 480):

"Mr. Candler makes 'Coca-Cola' so far as I know—the Coca-Cola Company."

W. A. MEDLOCH (Rec., 482):

"The Coca-Cola Company, of Atlanta, Georgia, is the maker of 'Coca-Cola.' I don't know how long I have known 'Coca-Cola.' I have known it almost since it came out. Well, I guess I have been drinking 'Coca-Cola'—I think I can safely say for fifteen years."

LINTON STEPHENS (Rec., 484):

"The drink 'Coca-Cola' is made in Atlanta by the Coca-Cola Company. Yes, sir; that is the drink so extensively advertised. Yes, sir; I have gone out of Atlanta, and 'Coca-Cola' is advertised all over. I have known the drink 'Coca-Cola' for about fifteen years, I suppose."

GEORGE MOORE (Rec., 487):

"Why, sure, we dispense 'Coca-Cola' at our fountain. I guess the Coca-Cola Company in Atlanta makes 'Coca-Cola.'

PETE VERGE (Rec., 488):

"I knew the drink 'Coca-Cola' since I came from Europe 14 years ago, when I came to the City of Atlanta. It is manufactured in Atlanta, by the Coca-Cola Company. Yes, sir; that is the drink that is so extensively advertised around."

W. T. HARTMAN (Rec., 492):

"It is manufactured in Atlanta by Mr. Candler—the company is the Coca-Cola Company. Yes, sir; it is the drink named 'Coca-Cola' that is advertised around the towns I have been in."

T. C. MARSHALL (Rec., 493), 19 years a druggist:

"This drink 'Coca-Cola' is manufactured in Atlanta by the Coca-Cola Company. I have known the drink 'Coca-Cola' twenty odd years. Yes, sir; that is the drink that is advertised extensively here and elsewhere."

J. B. PENDERGRAST (Rec., 496), druggist 12 years:

"Yes, sir; I have dispensed 'Coca-Cola' all that time. The Coca-Cola Company makes Coca-Cola—Candler, I suppose. Yes, sir; by 'Coca-Cola' I mean this drink that is so extensively advertised."

EARL KINBROUGH (Rec., 510):

"Coca-Cola is manufactured in Atlanta by Asa T. Candler. The name of his company is the Coca-Cola Company. Yes, sir; that is the drink that is advertised so extensively, it is advertised all over the country."

JOHN METOS (Rec., 511):

"Coca-Cola is the main drink sold at my soda fountain. It is manufactured in Atlanta by old man Asa Candler. The name of his company is the Coca-Cola Company. That drink is the biggest advertised in the United States, after the American Tobacco Co.'s products. I have known it for seven years, since I came South."

CLYDE PARK (Rec., 512):

"Yes, sir; 'Coca-Cola' is a soft drink dispensed at our fountain. It is made in Atlanta by the Coca-Cola Company. Yes, sir; that is the drink that is advertised around town extensively. I have known of it 12 or 15 years."

A. P. BLATSIOS (Rec., 513):

"I have known of this drink 'Coca-Cola' about eight years—since I have been here. Yes, sir; that is the drink that is advertised around town here."

DAVE S. BAUER (Rec., 533), Mobile, Alabama:

"I have been engaged in this (the retail drug) business for twenty odd years, during which time I have handled and dispensed 'Coca-Cola.' The Coca-Cola Company of Atlanta, Georgia, makes Coca-Cola."

ROBERT W. ELLIOTT (Rec., 562), Mobile, Alabama:

"Yes, sir; I am familiar with the product that is advertised under the name 'Coca-Cola.' The maker of that is the Coca-Cola Company, Atlanta, I believe. I have known of 'Coca-Cola' ever since I have been in the soda water business, say fourteen years, I guess."

SCHEDULE II.

The Use by the Public of the Abbreviation Coke and the Nickname Dope and Their Application to Coca-Cola.

The following are excerpts from the record with respect to the word Coke as an abbreviation of the name Coca-Cola and Dope as a nickname for Coca-Cola and establish that these words are short names used by purchasers in ordering and designating Coca-Cola.

GEORGE ALFRED HARBOUR (Rec., 456), Atlanta, Georgia, proprietor of Harbour's Smoke House; has conducted a soda fountain for five years and a half:

457 "Well, almost six or eight people out of ten often ask for 'Coca-Cola' under the name of 'dope.' Yes, sir; I recognize 'dope' as a nickname for 'Coca-Cola.' * * * I don't know that I ever called 'Coca-Cola' by the names 'koke' or 'dope' before I got in business—I may have. Of course, I call for it now under that name myself and I suppose ever since I can remember I have known it as 'dope.' "

I. L. JAMES (Rec., 460), Atlanta, Georgia, drug business:

460 "I have heard them come in and ask for 'Coca-Cola,' by asking for 'dope' and 'koke' and different things. When they ask for 'dope' and 'koke' I give them 'Coca-Cola.' I understand 'dope' and 'koke' to be a nickname for 'Coca-Cola.' * * * Why,
461 I guess I have heard the names 'koke' and 'dope' as nicknames for 'Coca-Cola' about five or six years.
463 * * * When a man asks for 'koke' or 'dope' I understand he means 'Coca-Cola.' "

ALEXANDER CRUICKSHANK (Rec., 463), Atlanta, Georgia, cigars and soda water; five stores:

463 "I am around the fountains in my various stores,
and have been, and hear people asking for drinks.
464 I have heard them ask for 'Coca-Cola.' They use a
number of nicknames in asking for it. 'Dope' is the
principal one, I think. Yes, sir; I heard the word
'koke.' When a man asks for 'koke' and 'dope' I understand that he wants 'Coca-Cola.' Yes, sir; I regard the names 'koke' and 'dope' as familiarly used nicknames for 'Coca-Cola.' * * * I couldn't tell you positively how long these nicknames have been used; to my certain knowledge they have been used at least eight years. They are very commonly used to the extent, I should judge, that sixty per cent of the people that drink 'Coca-Cola' call it by a nickname of some kind or other—'Candler's cocktail,' 'brick from the Candler building,' 'Candler's highball,' 'dope,' and 'koke.' No, sir; I have never had any doubt about what they mean when they use such expressions, and the dispensers haven't."

CHARLES KINGSBURY (Rec., 465), Atlanta, Georgia, cigar and soda water business:

"'Dope' is the principal name that is used in calls at my fount for drinks, and 'Candler's highball' and 'give me a brick in the Candler building'—all that kind of stuff. When people come into my place of business and call for 'dope' and 'koke,' I understand them to mean 'Coca-Cola.' Ever since I have been in business they have been calling it by that way—about six years."

F. H. SMITH (Rec., 468), Atlanta, Georgia, soda water business for ten, twelve or fourteen years:

468 "Oh, yes, when people mean 'Coca-Cola' they use
469 nicknames and slang terms, such as 'dope' and 'koke'
and 'Candler's whiskey,' and 'Candler's Highballs'—

I don't know, most anything you can think of. When they ask for 'dope' or 'koke' I understand that they mean 'Coca-Cola,' and that is what I serve them. Half of the people in Atlanta will ask for 'Coca-Cola' by the name of 'dope'—'give me a dope', half of them will say, instead of 'Coca-Cola.' Yes, sir; I recognize the words 'dope' and 'koke' as commonly used nicknames for 'Coca-Cola.' * * * I drank 'Coca-Cola.' I used to ask for it as 'dope' and 'koke'—everything else—it has been known as 'dope' ever since I have known 'Coca-Cola.' * * * When I asked for 'dope' I meant 'Coca-Cola.' "

DR. J. D. T. LAWRENCE (Rec., 470), Atlanta, Georgia, soda fountain for nearly ten years:

471 "I hear them ask for 'Coca-Cola.' Yes, sir; they use other terms when they mean 'Coca-Cola.' 'Dope,' I think is the biggest word they use. When a man asks for 'dope' I give him 'Coca-Cola.' * * * Well, I couldn't tell you how long 'dope' has been a nickname for 'Coca-Cola.' Seems to me I have heard it
472 ever since I have been selling 'Coca-Cola'—six or seven years, anyhow. * * * No, I don't think I ever heard anybody express his opinion on it or explain why,—just a sort of nickname I always looked upon it, a man drinking a 'Coca-Cola,' they suppose it is something like coffee, I expect, and just call it 'dope.' "

DR. F. F. LANGENFELDT (Rec., 473), manager of Palmer's drug store, Atlanta, Georgia:

473 "People sometimes ask for 'dope' and 'Coca-Cola.' I have occasionally heard them ask for 'koke,' very seldom, though. When they ask for 'koke' or 'dope' I give them 'Coca-Cola.' Yes, sir; that is what I understand they mean by those expressions. I have known the name 'dope' as a nickname for 'Coca-Cola' ever since I have been in Atlanta,—for eight years I have heard people ask for it that way. * * * I

haven't the slightest idea why people use this name 'dope.' No, I don't know what they use it for,—it's a nickname just like everything else."

DAVID G. WISE (Rec., 474), Atlanta, Georgia, for five years; keeps two retail drug stores:

474 "There are nicknames used for 'Coca-Cola' at my soda fountain—they often come in and ask for 'dope' and 'koke' and I guess that's all. When a person comes in and asks for 'dope' and 'koke' I understand they want 'Coca-Cola.' I have known the names 'dope' and 'koke' ever since I have been in the drug business here. Yes, sir; as applied to 'Coca-Cola.'"

W. R. STOVALL (Rec., 476), in the soda business, Atlanta, Georgia:

477 "When people come into my store and ask for soft drinks they hardly ever call for 'Coca-Cola'—I don't suppose that ten per cent of them ask for 'Coca-Cola' —they ask for 'dope.' Yes, sir; when a man asks for 'dope' I understand him to mean 'Coca-Cola.' * * * 'Dope' is a commonly used nickname for 'Coca-Cola' in Atlanta."

J. F. REDDING (Rec., 478), Atlanta, druggist:

479 "'Coca-Cola' is asked for at my fount by other names, such as 'Asa G.' and 'shot' and 'dope' and 'koke,' and those names, and several others. When a man comes into my fountain and asks for 'dope' and 'koke,' 'Coca-Cola' is what I give him. Yes, sir; I understand that that applies to 'Coca-Cola.' Those names have been in use ever since I have been dispensing drinks."

CHARLES B. GIARDINA (Rec., 480), Atlanta; soda fountan and cigar business:

480 "When people mean 'Coca-Cola' they call 'dope' and sometimes 'koke' in calling for it at my store.

When a man calls for 'koke' or 'dope' I understand
481 that he wants 'Coca-Cola,' I don't handle any other drinks similar to 'Coca-Cola.' * * * Some people say sometimes 'give me a "Coca-Cola" and they drink three and four times a day, sometimes twice a day and then next time they come in and say, 'Well, give me a "dope" '—you see? It's just that way. Yes, sir; I understand when they say 'give me a dope,' they mean 'Coca-Cola.' "

W. A. MEDLOCK (Rec., 482), a druggist having three stores in Atlanta:

482 "I don't know how long I have known 'Coca-Cola,' I have known it almost since it came out. Well, I guess I have been drinking 'Coca-Cola'—I think I can safely say, for fifteen years. * * * You ask if people ever use nicknames when they mean 'Coca-Cola'; well, they come in and call for 'Morning's Morning' or 'dope,' about the only nicknames I know of. When a man asks for a 'morning's morning' or a 'dope' I understand that to mean 'Coca-Cola.' * * * Q. 22. Do you regard the word 'dope' as a familiarly used and common nickname for 'Coca-Cola'? A. Yes, sir."

LINTON STEPHENS (Rec., 484), Atlanta, Georgia; ten years a soda dispenser:

484 "I have known the drink Coca-Cola about fifteen years. * * * Some call for 'Coca-Cola' and to make it short they call for 'dope.' I believe that is all I heard. I have only known the name 'dope' as applied to 'Coca-Cola' just a few years. When they ask for 'dope' they ask for 'Coca-Cola,' they don't
485 ask for any other drink at all. They don't say 'Coca-Cola' because it is too long, they call for 'dope.' Yes, sir; it is just a nickname for 'Coca-Cola.' * * * I have an idea why people and customers use the word 'dope,' they don't want to call it 'Coca-Cola' because it is too long, possibly that's one reason why

they call it 'dope'—because that's been the nickname for it for several years—they call it 'dope' and when they call for 'dope' they don't want anything but 'Coca-Cola.' "

GEORGE MOORE (Rec., 487), Atlanta, Georgia; business soda water supplies, and a retail place; also receives telephone calls for drinks:

487 "Yes, sir; I know the names people use when they mean to call for 'Coca-Cola.' All of my customers—I say all of them because I know them all and I have been there eighteen years at that corner, and I know them all—when they want 'Coca-Cola' they call 'give me a "Dope."' Sometimes they ask for 'Koke' or 'caffeine' and 'Candler's Highball,' they mean 'Coca-Cola' just the same, that's what they want—just a nickname they have for it—and even myself, I am ashamed to say it, myself the boss—when I want sometimes a drink, I say 'give me a
488 "dope."' I just got the habit of it, I hate to say it, but I do it a good many times. Oh, I have known the word 'dope' as a nickname for 'Coca-Cola' a long time, since 16 or 18 years ago, almost since I have been at that corner. Q. 17. Do you recognize the word 'dope' as a nickname for 'Coca-Cola'? A. Why, yes, sir. Q. 18. Do your customers? A. The customers do. They don't mean nothing but a 'Coca-Cola' for a nickname for 'Coca-Cola,' they call it 'dope.' "

PETE VERGE (Rec., 488) of Atlanta, Georgia, cigars and soda water, testified that he had known of Coca-Cola for fourteen years:

489 "We have 'Coca-Cola' signs, you know, but people call different names, you know—call it 'dope'—of course, when they say 'dope' we know they want 'Coca-Cola,' you know. Well, sometimes the boys call it 'Candler's highball,' but not as much as they

do 'dope' in my place. They say 'dope' seventy-five times and 'Coca-Cola' twenty-five times. I understand the word 'dope' to mean 'Coca-Cola.' No, I never hear the expression 'koke,'—just 'dope,' you know."

W. N. TUMLIN (Rec., 490), of Atlanta, Georgia; has operated a soda fountain for about ten years:

491 "They use various names such as 'dope' or 'koke' or 'Candler's Highball.' I understand them all to mean the same thing—'Coca-Cola.' Q. 13. State whether or not from your experience the words 'dope,' 'Koke,' and 'Candler's Highball' are familiar nicknames for 'Coca-Cola' so used by the public and understood by the trade. A. It is. * * * Well, the word 'dope' as a nickname for 'Coca-Cola' came into prevalent use about seven or eight years ago. I suppose seventy-five per cent of my trade would designate 'Coca-Cola' by some nickname. About sixty per cent of that seventy-five per cent would be 'dope,' some 'koke' and some Candler's Highball.' "

W. A. HARTMAN (Rec., 492), 173 Ashby street, Atlanta, Georgia, in the cigar and soda water business; has known of "Coca-Cola" for fifteen or sixteen years:

492 "You ask what names are used in designating 'Coca-Cola' at the fountains I have been to, besides 'Coca-Cola'; well, it's called 'dope'—I get orders over the telephone, 'Send me a "dope" and lime,' or 'a "dope" and orange.' I have occasionally heard the name 'koke' used, but not very much, not as much as I have 'dope.' I understand the names 'dope' and 'koke' to mean and apply to 'Coca-Cola' and 'Coca-Cola' is what I serve in response to such requests."

DR. T. C. MARSHALL (Rec., 493), Atlanta, Georgia, druggist, testified that he has known of "Coca-Cola" for twenty odd years:

494 "The other names that are used at the fountains, that I am acquainted with, in calling for 'Coca-Cola' are 'Coca-Cola,' 'dope,' 'koke,' and 'shot in the arm.' I have known 'dope' ever since I have been serving it. 'Koke,' though, hasn't been used but about the last ten years to much extent. I understand the names 'koke' and 'dope' to mean 'Coca-Cola,' and that is what I serve when those names are asked for."

J. B. PENDERGRAST (Rec., 496), druggist, of Atlanta, Georgia, testified:

496 "You ask if I know the names people use when they mean 'Coca-Cola'; well, the one we get most is 'dope.' When a man asks for 'dope' at my soda fountain I understand that he means 'Coca-Cola' and always furnish 'Coca-Cola' on such calls. No, sir; I have never had any one to turn it back and say it was not what was wanted. Yes, sir; I have heard the word 'koke' as a nickname for 'Coca-Cola' but not recently; it was several years back they used that a
497 good deal. It meant, as applied to a soft drink, 'Coca-Cola.' Well, as far as I remember I have heard the nickname 'dope' as a nickname for 'Coca-Cola' at least ten years. All that time we considered it a nickname for 'Coca-Cola.' Q. 22. You consider that as a definite request for 'Coca-Cola'? A. Yes, sir; we get it—we get calls for 'Candler's Highball,' 'Candler's "dope,"' but I think, though, half of them call for 'dope' meaning 'Coca-Cola.' * * * Some of the nicknames I have heard 'Coca-Cola' called by, are 'Candler's dope' and 'Candler's cocktail,' 'a shot,' 'morning's morning,' 'eye opener,' and 'brick in the Candler building,' 'help out Candler a little,' 'put another brick in his building,' In all these instances we served 'Coca-Cola.' * * * Irre-
498 spective of what I may have at my fountain I con-

sider these various expressions, 'koke,' 'dope,' 'Candler's Highball,' 'brick in the Candler building' as definite designations of 'Coca-Cola.' They are all expecting 'Coca-Cola'; that is what they all want; we never have any comment of any kind on it; they were always expecting 'Coca-Cola'; that is our understanding of it. If I were to meet a friend on the street and he would say to me 'Let's go into this soda fountain and have a "dope," ' I would understand that he was talking about 'Coca-Cola,'—that he was asking me to have a 'Coca-Cola' with him."

EARL KINBROUGH (Rec., 510), Atlanta, Georgia, soda-water dispenser:

"* * * Besides 'Coca-Cola,' the most frequent name that is used at my fountain in calling for it is 'dope.' 'Koke' is also used. When a person comes to my fountain and asks for a 'dope' or 'koke' I understand him to mean, and I sell, 'Coca-Cola.' * * *"

JOHN MEHOS (Rec., 511), Atlanta, Georgia, seven years, cigar, soda fountain and restaurant business:

"* * * You ask if any names are used at my soda fountain besides 'Coca-Cola' in calling for 'Coca-Cola'; lots of people have nicknames—they come in and say 'give me a "Coca-Cola," ' or 'give me a "dope," ' you know. All of them mean 'Coca-Cola,' you know. Yes, sir; I understand when a person comes to my soda fountain and asks for 'dope' that he means 'Coca-Cola.' "

522

CLYDE PARK (Rec., 512), Atlanta, Georgia, soda fountain:

"* * * Yes, sir; there are other names used at our fountain in calls for 'Coca-Cola' aside from the word 'Coca-Cola'—'dope' and 'koke,' that is about all, I think. Q. 14. Do you understand, if a person

comes to your fount and asks for a drink under the name 'dope' or 'koke' that they want 'Coca-Cola'? A. Yes, sir. Q. 15. If you would call for 'dope' or 'koke' would you mean 'Coca-Cola'? A. I would. If I should walk down the street with a friend and he should say, 'Let's go and have a "dope" or "koke," ' I would understand he meant 'Coca-Cola.' * * *"

A. P. BLATSIOS (Rec., 513), Atlanta, Georgia, soda business:

"* * * Yes, at my soda fountain I have 'Coca-Cola' called for by other names than 'Coca-Cola,' such as 'dope' and 'Candler's booze' or 'Candler Highball,' and all such stuff as that. When a person comes to my fountain and asks for 'dope' I understand that he wants 'Coca-Cola.' "

"(P. 514.) Mr. C. E. WILLIAMS, Mr. JACK WEINBERG, Mr. S. H. CROUCH, GEORGE POULOS, JOHN POULOS, GEORGE PRATTES, JAS. POULOS, Dr. F. W. McRAE, F. E. WALTHOUR, were ready to testify, and that their testimony would be about the same as others who testified in regard to 'Coca-Cola' and the nicknames for 'Coca-Cola.' "

G. H. UPCHURCH (Rec., 521), drug business, Mobile, Alabama; president and manager of the Bienville Pharmacy, Inc.; in the drug business for the past nine years in Mobile; before that in Tuscaloosa, Alabama, and Carrollton, Alabama, testified:

22 "Now, I don't know that I can relate all of the nicknames for 'Coca-Cola,' but the two most frequent are 'koke' and 'dope.' Now, I couldn't answer, either, as to how frequently the words 'koke' and 'dope' are used as nicknames for 'Coca-Cola' but I would say the larger per cent of the time—that is, the larger per cent of the calls come under the head of 'dope' or 'koke,' or some nickname. When a man comes into

my store and asks for a 'dope' or a 'koke' or says
523 'Give me a "dope," ' or 'Give me a "koke," ' I understand that he means 'Coca-Cola' and supply 'Coca-Cola'—those are my instructions to all the men at the fountain. No, sir; I have never known of any instances where the purchaser has rejected 'Coca-Cola' saying it was not what he wanted when we served it in response to such requests for 'dope' or 'koke'; on the contrary I have frequently asked the question as to what they mean and invariably they state 'Coca-Cola.' Well, I don't know exactly how long the nicknames 'koke' and 'dope' have been applied to 'Coca-Cola' but I expect, as I stated in my letter, nine or ten years, and I expect longer than that, but I think I can safely say nine or ten years to
530 my own knowledge. * * * The two names 'dope' and 'koke' are inseparably connected in my association with 'Coca-Cola'—in my estimation they mean 'Coca-Cola.' * * * You say you suppose that when I first heard the word 'dope' or 'koke' applied to 'Coca-Cola' that I thought it was because it had cocaine or some extract of cocaine in it; well, I didn't know why it was called that. The only thing I knew it was a nickname for 'Coca-Cola.' "

DAVE S. BAUER (Rec., 533), has been a retail druggist in Mobile, Alabama, for twenty odd years. During that time has handled and dispensed Coca-Cola:

534 "I have heard 'Coca-Cola' named 'dope,' 'koke' and other names. I think people use nicknames for 'Coca-Cola' more so than they call for 'Coca-Cola.' * * * You ask how long I have known the nickname 'koke' and 'dope' familiarly applied to 'Coca-Cola'; seems to me always, since I have been around the soda fountain, 25 or 26 years—24 years to be exact."

E. R. ALBRIGHT (Rec., 545), a druggist of Mobile, Alabama. Member of the firm of Albright & Wood, who operate two stores, testified:

545 "I know of nicknames for 'Coca-Cola,' that are commonly used; namely, 'dope.' Well, I have heard of 'koke,' yes, sir; but not as frequently as 'dope.'
548 * * * Why, I should say I have known the nicknames 'koke' and 'dope' to be applied to 'Coca-Cola' about eight years—eight or ten years. I know that I
549 drink 'Coca-Cola,' and have for years, and did before I went in business on my own account, and when I went into a place and asked for 'dope' I expected 'Coca-Cola.' * * * When a man calls for 'dope' without expressing anything else, I would think he wanted 'Coca-Cola.' I don't know why, but it has just been customary at soda fountains—at our fountain. No, sir; it was not because 'Coca-Cola' was recognized as having some element of cocaine in it,
550 or some 'dope' in it. I have not heard it called 'koke' as often as 'dope.' I very seldom ever hear it called 'koke' any more. No, sir; 'koke' did not pass out of general use long ago; I hear it occasionally now. The word 'dope' is used frequently, even, possibly as many times as 'Coca-Cola,' but the word 'koke' is used very infrequently."

GEORGE L. SEIBERT (Rec., 551), soda dispenser for Dave S. Bauer, the druggist in Mobile, testified:

552 "You ask if, from my experience as a soda dispenser, I have formed any opinion as to the meaning of the words 'koke' and 'dope'; well, the only way I can say, it would be more of a nickname for 'Coca-Cola.' When people want that, they think of it quicker and it's more of a nickname for it, too, because anybody coming in there—I have seen it quite often happen—and asking for 'koke' or 'dope,' they go to ask you about Candler in Atlanta, telling you how he got rich off of it, and they call for a 'koke' at the same time and then they will tell you about it:

therefore, they mean 'Coca-Cola' when they come in and ask for it. * * * The word 'dope' has no meaning to me except 'Coca-Cola,' that's all. I have never heard it used in any other way at a soda fountain. Yes, sir; it has a meaning. I understand it to
553 mean generally 'Coca-Cola.' When you ask me or anybody else for 'dope' you get 'Coca-Cola' down at
554 Bauer's drug store. * * * The words 'koke' and 'dope' are used interchangeably, one as much as the other—both used as a nickname for 'Coca-Cola.'"

R. W. ELLIOTT (Rec., 562), who is in charge of the Van Antwerp drug store soda department, in Mobile, testified that he had known of Coca-Cola for fourteen years:

563 "Q. 18. State what the facts may be in respect to the words 'koke' and 'dope' being commonly used as nicknames for 'Coca-Cola.' A. Well, they are commonly used as nicknames for 'Coca-Cola.' I have known these words 'koke' and 'dope' being used as nicknames for 'Coca-Cola' ever since I have been working around soda fountains, about 12 or 13 years. * * * These people who came in to drink 'Coca-Cola' in our place ask for it under different names; they ask for it under 'Coca-Cola'—I have heard them ask for it under 'dope'—I have heard them ask for a 'koke'—I have heard them call for a 'shot in the arm,' meaning 'Coca-Cola,' and I have also heard them call for 'morphine cocktails,'—a good many nicknames, all meaning 'Coca-Cola,' they are all satisfied when we give them 'Coca-Cola,' we never hear
564 any complaint. There is no way of getting at the proportion of people who ask for 'Coca-Cola,' using the name 'Coca-Cola,' I don't think. A customer will come in to-day and call for 'Coca-Cola' and to-morrow he will nickname it."

I. V. Wood (Rec., 566), of the firm of Albright & Wood, druggists of Mobile. Operate two stores. Has known Coca-Cola for about twenty years:

566 "I have heard the words 'dope' and 'coke' used as nicknames for 'Coca-Cola.' I have known them to be used as nicknames for 'Coca-Cola' practically as
570 long as I can recollect the name 'Coca-Cola.' I claim 'dope' has two meanings: It is a slang—'the dope on horse races,' 'the dope on the baseball game' and different things; but when a man comes to the prescription department, I would think that he wanted a narcotic if he called for a 'dope.' If he went to a soda fountain I would naturally think he wanted 'Coca-Cola.' * * * I can't exactly recollect that I was shocked that he wanted 'dope' the first time I heard a man call for 'dope,' because it has been a common expression of the word, used for a substitute for the word 'Coca-Cola'—as a nickname—I don't know which you might call it—since I have been big enough to know anything—I have been working in
571 drug stores since I was ten years old. * * * You ask if you are to assume that the customer who comes in never uses the word 'Coca-Cola' but always calls for either 'dope' or 'koke'; well, you can watch a customer, sometimes he will come in and ask for 'Coca-Cola' and possibly the next day he will call for 'dope' and the next day he will call for 'koke.' I find the average 'Coca-Cola' drinkers are liable to call for it under either one of these three names. I will say that there isn't twenty-five per cent of our customers that uses the correct name for 'Coca-Cola.' Possibly twenty-five per cent of my trade use the correct name and about seventy-five per cent of my trade will call it 'dope' or 'koke.' "

George S. Morse (Rec., 645), buyer for the Economy Drug Store in New Orleans, testified:

646 "You ask if people, when they mean 'Coca-Cola,' invariably use the name 'Coca-Cola' or if they have

other expressions; oh, sometimes they use other expressions. They usually ask for a 'dope' or 'koke.' When a person comes into our fountain and asks for a 'koke' or a 'dope' we understand that he means 'Coca-Cola,' and we furnish 'Coca-Cola,' in response to such requests."

C. G. PETERS (Rec., 653), druggist in New Orleans for twenty-eight years, operated soda fountain in connection with his business for same period, handling Coca-Cola for eighteen or twenty years:

654 "When people want 'Coca-Cola' most of them ask for 'Coca-Cola.' Some ask for 'koke' and some for 'dope.' * * * You ask how long I have known the names 'dope' and 'koke' to be used as nicknames for 'Coca-Cola'; lately,—I can't tell exactly, might be seven or eight years, might be longer."

PIERRE AUGUST CAPDAU (Rec., 664), a pharmacist, for thirty years in New Orleans, familiar with Coca-Cola having handled it off and on for twenty or twenty-five years:

665 "You ask me to state, when people order 'Coca-Cola' at my fountains, what names they use to indicate that they mean 'Coca-Cola,' and want that; some will say 'give me a "koke," ' and some others will say 'give me a "dope," ' and still others will say 'give me some drug'—they all use a humorous expression, or a slang expression, and it always indicates the one thing—and that is 'Coca-Cola.' "

O. P. BLAND (Rec., 670), soda water and ice cream business in New Orleans and handles Coca-Cola:

670 "Yes, sir; people coming to my place of business use other names besides 'Coca-Cola' in calling for 'Coca-Cola,' such as 'koke' and 'dope.' I understand those names to apply to 'Coca-Cola.' "

H. W. FLOWERS (Rec., 676), of New Orleans, dispenser at the soda fountain of Capdau, druggist, for six or seven years:

676 "I have heard the names 'dope' and 'coke.' If a man comes to my soda fountain and asks for 'dope' or 'coke' I understand that he wants 'Coca-Cola.' Yes, sir; that is applied to 'Coca-Cola,' generally."

R. W. BROWN (Rec., 681), of New Orleans, formerly of Vicksburg, Mississippi; in the soda water business:

681 "I have heard the names 'koke' and 'dope' used at our fountain. They apply to 'Coca-Cola,' that's what we generally give them when people use that nickname; they hardly ever call for 'Coca-Cola,' they say 'dope' or 'koke,' something like that."

FRED SCHWARTZENBURG (Rec., 680), managing Katz & Besthoff's soda fountain, New Orleans; has been serving Coca-Cola for several years:

681 "You ask what names are used at our fountain in calling for 'Coca-Cola,' 'dope' and 'koke'—any name that they think we'll understand that they want 'Coca-Cola.' When they use these various names I understand that they want 'Coca-Cola' and that it applies to 'Coca-Cola.'"

ALBERT J. MILLER (Rec., 679), in the confectionary business in New Orleans; has known Coca-Cola fifteen or eighteen years:

680 "We have calls at our fount for a drink under the name of 'Koke.' When a person calls for a drink of 'koke' I understand that they mean 'Coca-Cola' and I serve 'Coca-Cola' when they ask for it. They ask for 'koke,' and 'dope,' too, that's a nickname."

CECIL V. ROGERS (Rec., 735), druggist, Dallas, Texas; has been in drug business twenty-three or twenty-four years:

735 "You ask me to state if I know the expression used by my customers at my soda fountain, which I understand to be a request for the product of the Coca-Cola Company; well, they come in and call for it—I have had them come in and call for a 'dope' or call for a 'coke'—they very often, in fact more often, call for a 'coke'; they will come in and say 'give me a "coke,"' just abbreviate it. * * *
736 You ask how long I have known people to ask for 'Coca-Cola' under the name of 'coke'; I think it would be conservative if I said 15 or 16 years, during which
738 period they have called for it under the name 'dope,' but that is not as frequently as 'coke,' though. 'Coke' is the word they use more frequently than any other name I have known it to go under. * * * The first time I ever heard it called 'dope' I asked them 'what do you mean by "give me a dope"?' They had some plumbers and electricians right near my store and one of them said 'give me a dope.' I said, 'What do you mean?' and he said 'Coca-Cola,' but I hadn't heard that under that name."

JACOB SCHRODT (Rec., 740), druggist, Dallas, Texas:

740 "You ask if when people at our store come in they invariably use the name 'Coca-Cola,' or if there are other words used to indicate what they want; sometimes they call for a 'dope,' sometimes some of
741 them ask for 'coke,' some of them for 'a shot in the arm.' Some of them, very few of them, say 'Coca-Cola.' When a man asks for 'dope' or 'coke' we usually repeat back to him, 'Coca-Cola'? Ever since I have been in the drug business I have gotten in the habit, in fact I try to train all my help, that whenever a customer asks for anything in the store to repeat the name back to them as they understand it and if there is a mistake they catch it before it gets

any further, and I do same thing at the soda fountain. If a man says, 'Give me a dope,' I have the boys say, 'Coca-Cola'? When he says, 'Give me a dope' or a 'coke' we tell them we haven't got it because we don't serve anything else but 'Coca-Cola' along that line. No, sir; in response to the question that I have just stated the dispensers ask the customers—those who ask for 'dope' and 'coke,'—I have never had them say that it was not 'Coca-Cola' that was wanted. You ask how long I have known the word 'coke' as a short name for 'Coca-Cola'—oh, for years; I am not certain how many years it has been. The word 'coke' has been used for 'Coca-Cola' to say definitely it would be almost impossible; I have known it eighteen years, at least.
743 * * * No, as a result of my training my custom is not getting out of the habit of using the nickname and forgetting the regular name—that are just as bad as they have always been and if anything, worse, because they know that we know what they want. My regular customers that drink 'Coca-Cola' all the time say, 'Give me a coke,' where they mean 'Coca-Cola'; well, I know what they want, and they know that I know it, too. * * * Yes, sir; I have had purchasers come into my store and ask for 'dope' that I was not acquainted with and have had my dispensers ask them what they meant. No, sir; they did not say anything other than 'Coca-Cola.' "

CHARLES R. SMITH (Rec., 746), Dallas, Texas, drug business about fifteen years:

746 "They have different names for it. A fellow will call it 'coke,' 'dope'; some fellows come in and say, 'Give be a shot in the arm.' Well, of course, when they ask for it by those names I would naturally think they wanted 'Coca-Cola' and have always served them 'Coca-Cola.' "

J. W. ARRANT (Rec., 748), in charge of the South land Drug Store soda fountain, Dallas Texas; in the dispensing business a little over eight years:

748 "I am familiar with the names which customers apply to 'Coca-Cola' in asking for it. They call for it under the name of 'coke,' 'dope,' 'shot'—mostly ask for 'coke' when they come up to the fountain. When they do so I ask them what they mean and they say 'Coca-Cola.' * * * Something like a month
749 ago I put on a dispenser's test at the request of a representative of the Coca-Cola Company. That test continued something like a day and a half or two days. About ninety per cent of the people called for 'coke.' I would ask them, 'What do you mean when you say "coke"?' They would say, 'Coca-Cola.' Not one of them answered that question dif-
750 ferently. * * * Yes, sir; these people I was asking the question of the other day thought I was putting up a joke on them; or they would ask, 'What are you trying to do?' and I said, 'There has been a drink made here in Dallas called "Koke" and they want to know if you want "Koke" or "Coca-Cola."' They said, 'Hell, no, we want "Coca-Cola."'"

A. M. TIMMS (Rec., 752), soda man Owl Drug Company, Dallas, Texas, for ten or twelve years:

752 "We have had people ask for it different ways, some ask for 'coke,' you know, some 'Coca-Cola,' some would ask for 'dope,' you know. When a man asks for 'coke' or 'dope' I understand that he means 'Coca-Cola'; I generally ask him, 'Coca-Cola'? and he says, 'Yes.' I have been asking people that question ever since the last couple of weeks. A man asked me to put that test on and I have been doing so ever since. Before that I just gave them 'Coca-Cola.' I have never had 'Coca-Cola' rejected as not
753 what was asked for. I have known the name 'coke' to be used as a nickname for 'Coca-Cola' ever since I have been working in the business. In other

words, about ten or twelve years, something like that. They asked for 'coke,' 'needle,' and all like that; I didn't pay much attention to it. When a person uses these expressions I ask him and he says 'Coca-Cola' every time. You ask if I understand that 'coke' and 'Coca-Cola' are equivalent and mean the same thing; well, when they ask for 'coke' they always mean 'Coca-Cola,' that's what they mean. * * * Yes, sir; they only call it 'Coca-Cola' when they have a fit of absent-mindedness. They usually ask for it as 'coke' or 'dope.' I always ask them and they say 'Coca-Cola' all the time."

JAMES F. ROGERS (Rec., 754), drug business at the Southland Hotel, Dallas:

"My observation has been during the fifteen years I have been in business, that 'Coca-Cola' is called for under the names 'coke,' 'dope' and 'shot'—I believe those are the most frequent names—'coke,' however, is the most frequently called for; it is called for by fifty per cent of our customers now; they call it 'coke,' meaning 'Coca-Cola.'"

C. D. KINGSTON (Rec., 790), druggist, Dennison, Texas:

790 "The name 'Coca-Cola' is not invariably used in full by people who consume 'Coca-Cola' at my fountain. Some ask for 'Coca-Cola,' some 'coke,' some 'shot in the arm,' some 'dope.' When a man asks for 'coke' I understand that he means 'Coca-Cola' and 'Coca-Cola' is what I supply. I have never had it rejected on the ground that it was not what was asked for. I don't know how long I have known these words 'coke,' 'dope,' 'shot in the arm,' etc., to
791 be used as nicknames. It has been so long I have never paid any attention. It has been pretty near ever since I have been selling 'Coca-Cola,'—for five or six years—ever since I had a fountain."

R. L. ASBELL (Rec., 756), soda dispenser for Cecil Rogers, Dallas, drug stores; worked before that at Dimitri Minich; before that at Britton's drug store; before that at Brown & Allen's, and Cone's, Atlanta:

"At the various places that I have operated, people say, to indicate to me that they mean 'Coca-Cola,' they will ask for 'dope' and some places they call it 'coke.' In Dallas the most common name is 'coke.' In response to a request for 'coke' I furnish 'Coca-Cola.' I generally ask the question, does he want 'Koke' or 'Coca-Cola,' he would smile and say he wanted 'Coca-Cola.' * * * In Atlanta, my experience was that the name used over there was 'dope.' No, sir; I didn't hear people in Atlanta ask for 'coke.' When a person asked for 'dope' in Atlanta I understood he meant 'Coca-Cola' and furnished 'Coca-Cola.' No, sir; I never had it rejected as not what was asked for. Yes, sir; I do regard the names 'coke' and 'dope' as commonly used nicknames for 'Coca-Cola.'"

DEXTER H. HARDIN (Rec., 759), dispenser of Owl Drug Company, Dallas, Texas:

"Our customers call for 'Coca-Cola' under the names 'Coca-Cola,' 'dope,' 'coke,' 'shot.' I first remember hearing them about four years ago. * * * A test was made between two and three weeks ago at the request of Mr. Peace. The result of that test was that about a third of the customers called for it under the name of 'coke.' Whenever they called for 'coke' or 'dope' I asked if they wanted 'Coca-Cola' or 'Koke,' and the reply was 'Coca-Cola.' * * * I think there were about a hundred people come in during that time and about thirty-five of them called for 'coke.' Yes, sir; I asked each of those thirty-five what he meant by 'coke' and his answer was 'Coca-Cola'"

S. Y. ALTHOFF (Rec., 760), manager of the Owl Drug Store, Dallas, Texas; for thirteen years in the drug business:

761 "I know how purchasers of 'Coca-Cola' indicate that they want 'Coca-Cola.' The name 'Coca-Cola' is not invariably used; it is quite frequently shortened into 'coke' or other words used, such as 'dope' or 'shot.' When a man comes into our store and asks for either 'coke' or 'dope' or 'shot' I understand that he means 'Coca-Cola.' Yes, sir; these terms are familiarly used nicknames for 'Coca-Cola.' In response to requests for 'dope,' 'coke' or 'shot' we give 'Coca-Cola.' We have never had it rejected as not being what was asked for. I have heard the word 'coke' and 'dope' since I have been in Dallas, that is, about six years. During all of that period a request for 'coke' has been understood by me to mean 'Coca-Cola.'

The same applies to the use of the word 'dope.' You ask if I have ever thought of what the word 'dope' means in regard to that; well, the word 'dope' may mean to some people a narcotic or sedative or drug, but I don't think it has any connection with the drink. I have inquired, in a limited way, of 762 many people whom I know just in a friendly sort of way, when they come and ask for 'dope' or 'coke' I tell them we don't keep that, we keep 'Coca-Cola.' I have never gone into their minds to find out how or why they call it 'dope,' but we generally know it is a nickname for 'Coca-Cola.'"

O. M. BROWN (Rec., 763), clerk at the Oriental Drug Store, Dallas, Texas, and in charge of the soda fountain:

764 "In dispensing 'Coca-Cola' it has been called for during the period I have been selling it by those who use it under the names 'coke' and 'dope,' 'shot in the arm' and 'Coca-Cola.' I have been observing the name 'coke' applied to it ever since I began

noticing it, say five or six years ago. About three weeks ago at the request of the 'Coca-Cola' representative, Mr. Peace, I put on a test at the Oriental Drug Store, of our customers coming in. Q. 14. Well, now, what proportion of these people that called for 'coke' during the time that test continued wanted 'Coca-Cola'—that called for 'coke'? A. Well, half of them, anyway. Yes, sir; I would ask them what they meant and their answer would be 'Coca-Cola.' "

E. B. THOMAS (Rec., 766), confectionery business, Dallas, Texas; handled Coca-Cola about eight years:

766 "During this period my customers had been calling at the fountain for 'Coca-Cola' under at least somewhere in the neighborhood of a dozen names, I should judge. They called for 'dope' and called for 'coke' and they called for 'dry-town eye opener' and they called for a 'shot'—things like that. Yes, sir; they called for 'Coca-Cola,' also. They called for it as 'coke' frequently, as much as they did 'Coca-Cola,' if not more. I couldn't say as to how long they had been calling for it as 'coke,' it seems to me
767 it has been as far back nearly as I can remember—a good little bit, nicknaming it 'koke,'—seems like the same way as going into a saloon and saying, 'Give me a bottle of Bud'; as far back as I can remember they would say, 'Give me a bottle of Bud'—for Budweiser.' "

F. L. SKILLEN (Rec., 792), druggist, Dallas, Texas:

792 "The people at my fountain indicate that they desire the product of the Coca-Cola Company by calling for 'Coca-Cola' and 'coke.' When a person calls
793 for 'coke' I understand that he means 'Coca-Cola' and 'Coca-Cola' is what I supply in response to such demand. I have never had it rejected as not what was asked for. I would say that about twenty-five

per cent of the people call it 'coke.' I have known 'coke' to be applied as a nickname for 'Coca-Cola' ever since I have been serving it, which was fifteen
796 years. * * * I generally call for 'coke' myself. When I go to my own fountain I say, 'Give me a coke.'"

D. P. ENGLISH (Rec., 801), drug business, Dallas, Texas:

801 "I have been dispensing 'Coca-Cola' at other places in Dallas before beginning at my present place, and have heard customers calling for it frequently during that time. I know under what different names they call for it; some call for 'coke,' some 'dope,' some call it 'shot in the arm,' and various other names. A good many of them call for it under the name of 'coke.' I couldn't say exactly how long I had been hearing them call for it as 'coke,' but I should say some six or eight years, probably eight or ten years. No, I don't know just how long ago the Koke Company of Texas started business in Dallas, only I know that about two years ago, seems to me like, the first I knew of them being very prominent. My customers called for 'Coca-Cola' under the name of 'coke' long before that."

E. EWER (Rec., 807), druggist, Dallas, Texas:

808 "Yes, sir; I am around the fountains so that I can hear people when they ask for drinks, I wait on the table forty per cent of the time. Yes, sir; I deal in 'Coca-Cola.' Yes, sir; it is a drink that is in demand, very much so. I presume I sell more 'Coca-Cola' than any other one drink. Yes, sir; I know how people ask for it. The majority of them call for 'coke.' I understand when they call for 'coke' that they want 'Coca-Cola,' and I always furnish 'Coca-Cola.' No, sir; I have never had it rejected as not what was asked for. You ask what my opinion is as to whether the word 'coke' is a nickname or

short name among the public; I presume it is just a nickname for 'Coca-Cola'—not specially a nickname, either, but just to keep from saying the whole thing, just to shorten the word."

D. R. KEYSER (Rec., 809), manager Stovall Drug Store, Dallas, Texas:

809 "Yes, sir; the concerns with which I have been engaged have been dispensing 'Coca-Cola' at the soda fountain. Yes, I have observed the different names under which customers call for it; they call for it under the name 'coke,' 'dope' and 'shot in the arm' and I have had a few of them come up there, personal friends of mine, and say, 'Hit me with one,' in a very few instances. * * * Practically all of my customers call for 'Coca-Cola' as 'coke,' and when they do so I serve the 'Coca-Cola.' "

GEORGE C. KERSHAW (Rec., 811), manager of the Dade Drug Company, Dallas, Texas:

811 "You ask if people who desire drinks invariably call it 'Coca-Cola,' or if they make their wants known through other means; they seem to have different slang expressions for it,—sometimes call it 'coke' or 'dope.' When a man calls for 'coke' or 'dope' I have always thought that he wanted 'Coca-Cola' and have always given him 'Coca-Cola'. * * * You ask how long I have known 'coke' to be used as a short name for 'Coca-Cola'; practically ever since I have been around the soda fountain; namely,
812 for about ten years. * * * Some people call for 'Coca-Cola,' some people express it as 'coke' and still some others use a worse and more slangy expression—they say 'shot in the arm'—'give me a shot in the arm'—all meaning 'Coca-Cola,' or so taken by me and the soda fountains. No, the name 'Coca-Cola' is not dying out—I guess about half of the people still say 'Coca-Cola.' As I say, about half of the people call for 'Coca-Cola' and about half call

for 'coke' and 'dope' and slang expressions meaning 'Coca-Cola.' No, sir; I don't try to correct that impression. Yes, sir; we have a lot of literature in our place begging the public not to use nicknames—to ask for 'Coca-Cola' under its own name, but I don't try to get people to use those names in calling for it. Yes, about half of my customers call for it under the name 'Coca-Cola.' "

TONY GIARRAPUTO (Rec., 814), Dennison, Texas, in confectionery business thirteen to fifteen years:

"My customers call for it under more than one name; sometimes call it 'coke'—'Give me "coke" '—they come say, 'Give me "dope" '; sometimes, of course, a new customer he say, 'Give me "shot in the arm," ' and, of course, I know of no such names because it look too bad in business. You ask if many or few call for it under the name of 'coke'; well, of course, in small town, you know, I couldn't say no 'coke,' of course, get many strangers, but my own folks, men come say, 'Give me a "coke" '— they use such language, the language I was speaking about,—it's custom, you might say, family custom by us, it's like family custom you might say, we do business with every hour, you might say, of course, they are joking, but the name is regular, they say, 'Give me "coke," ' and absolutely they mean 'Coca-Cola'; if you was to try to give him something else they won't stand for it; therefore, I have been in business the time I answered a while ago and I never did have an imitation of 'Coca-Cola,' they been people try to sell to me, but I never did the buying. * * * I believe about ten per cent of my customers call for 'Coca-Cola' and the balance call for 'coke.' Ninety per cent call for 'shot in the arm,' 'dope' and 'coke.' You ask if the name 'Coca-Cola' is passing out and if I hear it now as often as I used to; well, they abbreviation a little bit. They abbreviate the name of 'Coca-Cola' a little, yes, sir; exactly, and I suppose the abbreviation is taking the place of the name.

Yes, sir; I believe that is the case in Dennison wher I live."

W. H. RAMSEY (Rec., 820), drug business, Denni son, Texas:

820 "You ask under what different names my cus tomers call for it at the fountain; they call fo 'coke,' 'Coca-Cola,' and 'dope.' I suppose fully two thirds of them, at least, call for 'Coca-Cola' a 'coke.'"

F. W. HAYDEN (Rec., 821), retail grocery business Pilot Point, Texas:

"The orders now presented to me marked Plain tiff's Exhibit No. 162, which were identified by th witness Lupton this morning, were written by me They were addressed to the Coca-Cola Bottlin Works and I was making orders for so many case of 'coke' in each one. By the use of the word 'coke I intended the Coca-Cola Bottling Company to un derstand that I wanted five cases of bottled 'Coca Cola.' I presume I have been dealing with the Coca Cola Bottling Company at Dallas and calling i 'coke,' when I wanted 'Coca-Cola,' about eight years I called it nothing else except 'Coca-Cola.' I would not use the name 'Coca-Cola' very frequently. usually wrote these matters hurriedly and abbrevi ated them and made them as short as possible. You ask if I wrote the word 'coke' then as an abbrevia tion of 'Coca-Cola'; yes, sir."

J. B. SMITH (Rec., 823), in restaurant, confection ery and cold drink business in Tioga and Pilo Point, Texas:

823 "You ask if I know what he was ordering whe he was ordering 'coke'; he was ordering 'Coca Cola,'—he might have wrote it 'coke,' but he wa
824 ordering 'Coca-Cola.' * * * If he wrote it 'coke

why he meant it for 'Coca-Cola.' Just shorter meter, you know. * * * At Pilot Point we are carrying on a soft drink business; we sell milk shakes, 'Coca-Cola,'—signs in the house say 'Coca-Cola Bottling Works; call for it by the right name,' but nearly every one says, 'Give me a "coke," ' and it's branded on the bottles; * * * there is supposed to be about half of them say, 'Give me a bottle of "coke." ' No, sir; they do not call it 'dope,' they just say 'coke.' Nobody out in the country has ever called it 'dope' to me. At Tioga I have had them say, 'Give me a shot in the arm'—they mean 'Coca-Cola,' though, of course."

PETER CAMARINOS (Rec., 827), confectioner at McKinney, Texas:

"You ask if I know how people ask for it when they indicate to me that they desire the product of the Coca-Cola Company. They say 'coke,' 'dope,' 'shot in the arm,' 'hop,' sometimes. I understand by requests for any of those things that they want 'Coca-Cola.' "

T. J. BRITTON (Rec., 829), retail drug business, Dallas, Texas:

"You ask how people who come to my fountain indicate to me that they desire the product of the Coca-Cola Company; well I should judge that about fifty per cent of them call it 'Coca-Cola,' the balance of them call it 'coke' and 'dope'—'coke' and 'dope' are the principal names. When a man asks at my fountain for 'coke' or 'dope' I understand that he means 'Coca-Cola' and I always supply 'Coca-Cola' in response to such a request. I have never had it rejected as not what was asked for. I don't know how long 'koke' and 'dope' has been used as designations of 'Coca-Cola'—oh, in the last six or seven years, I judge, maybe longer, I don't know. Yes, sir; I have known the name 'coke' as a nick-

830 name for 'Coca-Cola' about the same length of time."

B. W. FULLER (Rec., 833), in soda water business. Has been with Vienna Ice Cream Factory, Kirby Drug Company and the Palace Drug Store, Dallas, Texas:

833 "My customers buying 'Coca-Cola' call for it as 'coke,' 'Coca-Cola,' 'dope' and 'shot.' About nine out of each ten call for it under the name of 'coke.'"

EDWARD T. LANGAN (Rec., 894), 55 East Congress street, Chicago. Has been in drug business; worked for A. W. Adamick, Chicago avenue and Clark street as drug clerk; connected with Auditorium Pharmacy for a year; has sold Coca-Cola for the last twelve years:

894 "When people order 'Coca-Cola' they use various names to indicate their desire. Take it as a rule, a
895 stranger coming in that you do not know will ask for 'Coca-Cola,' but a regular customer coming in, they get in the habit of talking to you and kidding you and they ask for, oh, lots of things, like 'dope,' 'shot in the arm,' and 'coke.' When a man asks at any of the fountains with which I have been connected for 'coke' I understand that he means 'Coca-Cola.' I could not say that I have ever made any inquiries of people asking for 'coke' as to what they mean because I always repeat 'Coca-Cola'? and they always say, 'yes,' and when a man asks for 'dope' or 'shot' or anything like that, I turn around and ask them every time whether they mean 'Coca-Cola' and they say, 'yes.' Ever since I have been in the business, about twelve years, a few would come in and ask for 'coke.' * * * They also use the expression
897 around Chicago, 'dope,' meaning 'Coca-Cola.' * * *
899 I said on direct examination that frequently when a man would come into my fountain and ask for

'dope' I would say inquiringly, 'Coca-Cola'? and I
900 have never had anybody in response to that inquiry say that 'Coca-Cola' was not what he meant when he asked for 'dope.' No, sir; I have not any doubt from my experience what a person meant when he came to a soda fountain and asked for a drink under the name of 'dope.' He meant 'Coca-Cola.'"

Admissions of the Respondents' Witnesses.

It is clear from the admissions made by the witnesses called by the respondents that the words Koke and Dope are generally used nicknames for Coca-Cola. The following are quotations from the testimony:

WILLIAM F. DAVIS, of Davis-Fuston Drug Company, Nashville, Tennessee, testified as follows:

1107 "I think 'dope' is a nickname used for the 'Coca-Cola' drink more than any specific name, probably."

JOHN D. FLETCHER, manufacturer of carbonating syrup, Nashville, Tennessee, testified:

1099 "This was part of my answer and I swore to it. 'Defendant avers and says that shortly after the preparation of Coca-Cola syrup and extract was put upon the market by J. S. Pemberton, for brevity's sake, the words Coca-Cola syrup and extract were contracted by the users and consumers of it, first, to the words "Coca-Cola" then to the words "Coke" or "Koke," and finally, the product of J. S. Pemberton was styled "Dope," the consumers throughout the country believing the preparation or beverage to contain cocaine, the word "Dope" denoting to the layman generally cocaine.'"

This carries the date of the use of these nicknames for Coca-Cola as far back as 1887. Pemberton died in 1888. (Rec., 1590.)

A. W. STANLEY, in the hotel business at Chattanooga, Tennessee, testifies:

1005 "If he would say a dope, of course, before Koke or any other drink was introduced, come in, and we only had Coca-Cola, I would understand he wanted Coca-Cola. Lots of fellows would come in and say, 'Give me a dope.' I would say, 'What kind of dope do you want?' and he would say, 'Give me Coca-Cola, or give me something else.' You know sometimes they call Coca-Cola dope, you know how these fellows are."

BURTON JONES in drug business at St. Elmo, Tennessee, testified:

1006 "I have had calls for dope at my establishment, when a customer asks for dope, he wants a cola drink of some kind. There are so many substitutes on the market, they might want a cola drink. I do not know about that, I would not say positively they would want a cola drink, or want one of the same articles. I would not say what he would want. * * * When customers come to my store and ask for 'a dope,'
1011 we serve Coca-Cola. * * * When a man came into our place of business and asked for a Koke or a Dope prior to the three years we handled Tru-Cola, we would give him Coca-Cola to drink, and when we put that Tru-Cola in, when he called for a dope or such as that, we gave him this Tru-Cola. Prior to that time I was new in the business and understood that he wanted Coca-Cola. * * * Up to the time
1012 we put in Tru-Cola when people asked for a koke or a dope, they wanted a cola drink. I suppose Coca-Cola. * * * Up to the time we put in Tru-Cola
1013 we served Coca-Cola for koke or dope, that is what we understood it to be. * * * At first when handling Coca-Cola, if men asked for a koke or a dope I gave them Coca-Cola and after I put in Tru-Cola and a man asked for Koke or Dope, I gave him Tru-Cola. I changed because there was fifty cents difference in the price of the syrup."

R. K. SMITH, first soda clerk with the United Cigar Store Company at Nashville, Tenn., testified:

1187 "We have people come into our fountain and ask for Koke and Dope. If it should be a regular customer that I have been in the habit of serving at all times and know what he drinks, I give him Coca-Cola if that is what he drinks, otherwise if he asks for Koke or Dope, I ask if he wants Coca-Cola.
1188 * * * A lot of people call that meaning Coca-Cola when they say Dope. * * * I have had people come in and ask for Dope and then laugh and say give me a Coca-Cola. * * * There is no doubt
1190 there are men who mean Coca-Cola and ask for it under the name of Dope; use Dope as a nickname for Coca-Cola, and the word Koke too; they use that for a nickname for Coca-Cola. That has been so for sometime in the south. * * * I remem-
1189 ber an occasion where I called in and asked for a Dope, at Harrison, Tenn., and getting a drink. That has been seven or eight years ago that I was out driving with a friend of mine and asked for a Dope, and got a bottle of dope from a little country store. I drank it; it tasted very similar to Coca-Cola. It was labeled Dope. * * * That circumstance I
1190 related at Harrison, Tenn., when I asked for Dope I expected to get a Coca-Cola. * * * I expected
1191 to get Coca-Cola because I had been there at Chattanooga and the rest of the boys around, you know, call it Dope, and had that in my mind when I asked for Dope."

J. G. BOOTH, soda dispenser, in employ of Paul and John Stumb, Nashville, Tenn., testified:

1169 "Customers come into the soda fountain and ask for a koke or a dope and call for lots of different names, as Koke, Dope, shot in the arm, shoot me, anything like that and Coca-Cola. When they ask for these names at Stumb's I give Coca-Cola, at the other places if they call for Dope there, as well as

I can remember I give them something we had in the place of it. Maybe I would always have two pumps if they had anything else like that, and they would tell me if we had calls for Coca-Cola I was to give them Coca-Cola, and if they called for it straight that way, and then if they called for some other name that he would not know for sure whether they wanted the straight Coca-Cola or some other
1170 drink, to shoot one of them to them. That is what they always told me to give. When a customer came into our place of business and asked for a Dope or a Koke I would think he was asking for a Dope or a Koke, there are so many different ones on the market, I would think he was asking for a class of drink instead of some specific drink. If he wanted the original Coca-Cola, if he is that particular about it, he ought to call for it under the real name of Coca-Cola and not a substitute name.

By a substitute name I mean Koke, Dope, shot in the arm."

J. E. DUNN, soda fountain business in employ of Nashville Drug Co., Nashville, Tenn., testified:

1159 "We handled Coca-Cola exclusively. I regard these other cola drinks as imitations used principally as substitutes. At our present store we handle nothing but Coca-Cola and in response to calls for Koke or Dope or a shot in the arm, I serve him with Coca-Cola and understand that is what he means the biggest portion of my time. They use those names as nicknames for genuine Coca-Cola. * * * If a man puts it in his place, and serves it to everybody that comes in, no matter what they call for, it would be a substitute, but if a man puts it in and has Coca-Cola with it, and if a man calls for the substitute drink give it to him, but unless he calls for the genuine stuff give it to him.

1160 If a person asked for a Dope and I gave him this so-called substitute, if he was a stranger to me and I did not have a personal knowledge that he wanted

Coca-Cola, I would consider I was giving him what he wanted. You will find the biggest majority of dispensers that are serving two will do that. They give themselves the benefit of the doubt, they don't care so long as they get the drink to him and make more money out of it."

PAUL E. WEBB, soda dispenser. In employ of United Cigar Store Company, Fourth and Union streets, Nashville, Tenn., testified:

"At Smith Brothers in Jackson, when they had only Coca-Cola, I served Coca-Cola when asked for Koke or Dope. * * * Probably at that time I thought he wanted Coca-Cola when he asked for Koke but later on I knew the difference. * * * I was at Henry Sykes in the Stahlman Building and they used two kinds there. They handled Coca-Cola and Dope, they said Dope was anything except Coca-Cola. They made more money on it, and that is the reason why they sold the other for Dope and Koke. When I first started out in the business I understood the names 'Koke' and 'Dope' to be nicknames for Coca-Cola. I understood that they were nicknames of Coca-Cola exclusively, Koke and Dope at first."

GEORGE R. EDMONDSON, a druggist, in Atlanta, Ga., testified:

1300 "When asking for a Dope I think they want Coca-Cola. When they ask for Koke I guess they want something, there are so few, I never heard but a few ask for a Koke, and Dope; there are quite a few that call for it. I have heard those expressions applied to Coca-Cola, that is, Dope, just as far back as I can remember, I guess. Most of them ask for Coca-Cola, or a Cola but a man may come in and say give me a Dope, or a Dope and lime. I have understood always what they meant. * * * The
1301 reason I say that Dope in my opinion means Coca-

Cola is that everybody in Atlanta that drinks that want Coca-Cola because there is nothing else sold here except Coca-Cola. You ask a man the second time and he will say Coca-Cola, ninety-nine out of one hundred times, because they do not know anything else."

CHARLES W. BURTON, of Birmingham, testified as follows:

1325 "I have heard people ask for Dope and you would set that out and they would ask for Coca-Cola. The man behind the bar is supposed to give a gentleman just what he asks for. I have heard the public ask for Dope and set it out and they would say: 'I want Coca-Cola.' That is since I have been out of the saloon business for a year and a half, between the intermission of 1908 and 11, I was in the soda-water business in a retail way, before I discovered this, that they would come in and ask for a Dope and they meant Coca-Cola."

A. S. JOSEPH, of Birmingham, testified as follows:

1335 "When a person asked for Dope or Koke, I gave them Coca-Cola."

H. O. ADAMS, of Adamsville, Alabama, testified as follows:

1345 "I never have handled any Coca-Cola. Oh, a long time ago, about twenty years ago I probably handled a few cases. They called that Dope then, yes, sir."

J. L. DRAKE, a soda dispenser for the Nunnally Company, 318 Twentieth street, Birmingham, testified as follows:

1403 "I have always served Coca-Cola when Dope is called for. They have several slang words used for calling for these drinks. Some of them say Dope, some say Koke, some say—I don't know what all

they don't say, and these slang words, whenever they used them, wherever I have been I served Coca-Cola."

C. N. BAKER, bottler, Newnan, Georgia:

1407 "There is not but very little difference in all these Cola drinks in taste and color, if any. It takes a mighty close expert to tell the difference. I have a boy who can tell the difference, if there is any, but he does not do nothing but mix and bottle and of course he knows when he gets hold of them. * * * The names the purchasers who want to buy a bottle of this stuff, use in asking for it, some will call for a cola, some for a Dope. I have sold a many a one for Dope. I reckon I have sold a fourth of what I put up for Dope and they got to calling it Dope until the Coca-Cola Company got to advertising it on everything, you know, to call it straight Coca-Cola. On this Dope question, you know, they would fool them in it and they are advertising, you will find it now, I expect, around town here where they advertised to call it by name, straight Coca-Cola. About half the men come in now in our town, and get to where they don't hardly call for anything, they go into the box and case and look like that, and get what they want and pull the stopper off and drink it. I tell my customers around town they don't need to have a clerk to set it out, but all the men could wait
1408 on themselves, but of course when I don't know that you call for anything, well if you come in and ask for a Dope it don't make any difference what you have, you give it to him, I do, always did."

H. M. TODD, druggist, Jackson, Mississippi, testified:

1441 "I have heard of these terms Dope and Koke about six or seven years. They apply to Coca-Cola to some extent. They impressed the customers who generally come in and called for Coca-Cola, so much, just like anything else, a nickname, Koke and Dope. I first heard these terms Koke and Dope just after Coca-

Cola came out and when people come in and asked for Koke or Dope, as nicknames for Coca-Cola."

ROBERT E. OUSLEY, druggist, Kosciusko, Mississippi, testified:

1449 "I would have thought that Koke or Dope had applied to any Cola drink. I do not know what it meant before I knew of these drinks, that has been so long ago. I expect most of us would naturally infer that they were nicknames for Coca-Cola, of course, I never gave it that kind of thought."

HUGH LEE BOYD, druggist, Kosciusko, Mississippi, testified:

1450 "I am dispensing the Southern Koke Company's Koke or Dope, and Coca-Cola. Customers indicate to me that they want a Cola drink by asking for a Koke, Dope, give me a shot and things like that. When customers come in and ask for a Koke, Dope or a shot in the arm, or shot, I do not understand or consider that they are making a definite and specific request on me for Coca-Cola and nothing else,
1451 because some of my customers know what I handle. I do not know how they know I am handling
1455 Dope. * * * When I asked for Koke and Dope I expected to receive a Cola drink. I might have expected to receive a Coca-Cola. I did not know the difference."

H. F. CRISLER, druggist, Jackson, Mississippi, testified:

1427 "I have heard the word Dope used quite a long while, almost ever since I have known Coca-Cola,
1435 for that matter. * * * Coca-Cola is supposed to be made in Atlanta, Georgia. I mean the one that is advertised, ask for genuine Coca-Cola if you want it. 'Ask for the genuine if you want it, nicknames
1436 encourage substitution.' I have seen that adver-

tisement. It naturally wants you to demand Coca-Cola irrespective of what you might want. I suppose they are referring to any Cola product. I judge that they have reference to Dope and Koke."

T. D. CULBERTSON, Dallas, Texas, the Texas Drug Company:

1703 "Mr. Candler did not have any particular objections to Koke except that it was being sold at the fountains as a competitor, is all that I know. He regarded it as a substitute, a familiar nickname for Coca-Cola, and on the ground that he objected.

Q. And it is a matter of common knowledge, isn't it in this section of the country that it is a common nickname for Coca-Cola?

(Objected to.

A. Yes, sir."

Trade Name Experts.

In addition to the testimony of trade witnesses who swear that Coke is and for many years has been the familiar nickname for Coca-Cola, The Coca-Cola Company has produced testimony of a different kind to establish this fact. Representatives of The Coca-Cola Company were sent to a large number of towns and called at soda fountains for Coca-Cola, Coke and Dope on separate occasions and at the same time observed customers using the same words. In every instance the syrup to make the drinks called for under the names Coca-Cola, Coke and Dope was drawn from one and the same container. The proprietor or dispenser was then interviewed and asked what was meant by Coke and Dope and in each instance replied that these words were short names for Coca-Cola. In many places consumers' tests were made. A consumer's test is conducted in the following way: A representative

of the Coca-Cola Company stationed himself for a considerable period of time at the fountain, and whenever a purchaser used the name Coke or Dope the dispenser in the presence of the witness, asked the person using such word what he meant. In every instance the answer was Coca-Cola.

Attention is called to the fact that in the tabulation which follows the name "Dope" as a nickname for Coca-Cola is more extensively used in the territory east of the Mississippi river than is "Coke," but that west of the Mississippi river the name Coca-Cola is more commonly abbreviated into Coke.

Respondents sell the same product under two names "Dope" and "Koke." It is admitted that Koke and Dope are the identical thing. There is no difference in the substance. (Rec., 1687.) East of the Mississippi river, where Coca-Cola is known by the nickname "Dope," the word "Dope" is used by the respondents upon the labels on the containers in which their product is sold. West of the Mississippi river, where the name Coca-Cola is abbreviated to Coke respondents' product, which is identical with that sold east of the Mississippi river as Dope, is sold exclusively under labels with the word Koke upon them. The name Dope nowhere appears.

J. G. Van Winkle, Secretary of Koke Company of Texas (Rec., 1715), says: "The product of the Koke Company of Texas has always been sold under the name of 'Koke,' never under the label 'Dope.' Some of the other Koke Companies use it ('Dope'); that is my understanding."

The following is a tabulation of the expert testimony on nicknames:

THOMAS LESLIE BOSWELL (Rec., 421):

422 Towns visited: Collins, Ellisville, Laurel, Meridian, West Point, Starksville, Macon, Columbus, Okolone, Corinth, Iuca, Ripley, Pontotoc and Oxford, Miss. Montgomery, Tuskegee, Selma, Eufaula, Dothan, Birmingham and Red Bay, Ala. Pensacola, Tallahassee, Lake City, Jacksonville, Palatka, Ocala and Tampa, Florida.

The following is a tabulation of the experience of the witness in asking for "Coca-Cola," "Coke" and "Dope" on separate occasions and his observation of customers using these same words. All were served with drinks made from syrup drawn from one and the same container. (* indicates the container was marked "Coca-Cola.") The first column indicates the page of the record. The second the name of the town. The third the name of the store. The fourth the name of the proprietor or dispenser. The fifth the number of calls for "Coca-Cola" during the witness' observation. The sixth the number of calls for "Dope" during the period of the witness' observation. The seventh the number of calls for "Coke" during the period of the witness' observation.

			Propr. or Dispenser	CC	D	C
424	West Point, Miss.	*P. H. White Drug Co.	Jim Figure, d			
		City Hall Drug Store	Mr. Turnipseed			
		E. P. Wilson Drug Co.				
		J. B. Johnson	Mr. Tomlinson, d.			
	West Point	P. L. Bouchillon	P. L. Bouchillon			
		Barksdale & Bennett Grocery Co.				
	Starksville	*Jackson & Son Drug Co.	J. A. Jackson			
	Starksville	J. A. Clardy	J. A. Clardy	1	2	
	Starksville	J. T. Kirk		1		
	Starksville	*Jas. J. Gill			1	
	Starksville	Cox Bros. Grocery	Earl Cox		3	
	Macon	*C. L. Ferris Book Store	C. L. Ferris	1	2	
		*Nicholas&DorahGro.Co.	L. T. Dorah J. Q. Nichols			
		Gem Pharmacy	E. E. Hammond, P. T.W.Jackson,Jr.,d.			
		*Murphy Drug Store	Ed. M. Murphy, P. S. T. Pennington, d. Henry Pattee, d			
		L. C. Tucker, Grocery	L. C. Tucker			
	Columbus	Johnson & Cain Drug Store	E. C. Johnson and S. L. Cain, Ps.	1	0	1
		Weaver & Harrington	W. B. Harrington			
		Street's Drug Store	W. B. Street		2	
		*John R. Laws, Druggist				
		Wilson Drug Store	Mr. Wilson			1
	Columbus, Miss.	L. E. Lides Drug Store	L. E. Lides, P.			
		L. E. Mayfield Drug Co.	L. E. Mayfield		1	
	Okolone	Elliott & Bell	Mr. Bell, P.		3	
		L. E. Gast Bros., Gro.	L. E. Gast			
		Bearden & King Drug Store	W. E. Bearden		3	
		Liggen & Bros.	R. H. Liggen, P.			
	Corinth	C. A. Turner, Gro.	C. A. Turner, P.	2		
		H. E. Walker	R. C. Battles	4	2	1
		J. M. Mitchell's Pharm.	J. A. Mitchell, P.			
		Henry's Pharmacy	Mr. Henry, P.			
		*McVay & Co.	R. R. McVay		2	
		H.M.McAnnis Drug Co.	Mr. McAnnis	1	2	
		H. M. Stone's restaurant and bakery	H. M. Stone			
		Corinth Drug Co.	H. M. & T. F. Seigman, Ps.			
	Holly Springs	Pure Drug Co.	K. C. Campbell, P. J. L. Alverson, d.			
		D. J. Oliver	D. J. Oliver, P. Joe Howard, d.	2	2	
425		L. H. Dancy	L. H. Dancy, P.	1	1	
		W. C. Robinson	W. C. Robinson		1	
	Ripley	C. M. Pfyfer & Co.	C. M. Pfyfer	1	1	
		R. R. McCord	R. R. McCord	1	1	
	Red Bay, Ala.	Red Bay Drug Co.	J. A. Gray, P.	2		
	Pontotoc, Miss.	Furr & Carter Drug Co.	J. M. Furr and R.E.Carter,Ps.			
	Pontotoc	C. D. Mitchell & Co.	C.D.Mitchell,P. B.B.Anderson,Cl. S. V. Pitts. E. C. Nesbitt, d.	1	1	

			CC	D	C
Oxford	Chilton Drug Store	C. W. Chilton, P.			
	Rowland Drug Store	Herron Rowland, P.			
	Bramlett & Sons	Eugene Bramlett			
Montgomery, Ala.	G. M. Chatfield Drug Co.	G. M. Chatfield	4	2	1
	J. Johnson Moore	Carter Maston, D	2	4	
		J. Johnson Moore, P.			
	May's Bakery and Confectionery	Stewart and Duncan May, Ps.			
	Lyon Head Drug Store	C. T. Ruff, P.		3	1
Tuskegee	L. C. Lewis	Mr. Lewis, P.	2	5	
	Hardin Howard Drug Store	Hardin Howard		2	
	Johnson Bros. Drug Store	E. D. Johnson, P.		2	
Selma	Rockmills Bros.	R. R. Rockmills	6	5	
	G. A. Swift	E. J. Word, d.	1		1
	Tillman Drug Co.	W. P. Cook, Mgr.	3	5	2
Pensacola, Fla.	Central Pharmacy	M. B. Scott, Mgr.		2	
	J. S. Pinkussohn Cigar Stand	R. H. Capers, d. and Mgr.	4	9	1
	Balkcom Drug Co.	B. F. Balkcom, Mgr.	1	4	
Tallahassee	Holmes Drug Co.	J. McNair	2	6	
		C. N. Tombs, P.			
	Hardee-Smith Co.	L. K. Cohen		1	
		J. Johnson, Clk.			
Lake City	De Soto Drug Co.	M. H. Tibbals, Mgr.			
	C. E. Lewis	C. E. Lewis, P.	1		
	A. R. Wise & Co.	A. R. Wise	1	5	
Jacksonville	Dr. William D. Jones Drug Store	Wm. D. Jones, P.		5	2
	J. Daniel Boone & Co.	L. M Holmes, Mgr	1	3	
	Clark's Drug Store	E. C. Clark, Mgr.	5	10	
Palatka	City Drug Co.	J. H. Haughton, P.	2		2
	Ray's Confectionery	Jas. Ray, P.	2		
	Smith's Confectionery	L. H. Smith, P.			
Ocala	Gerrig's Drug Store	J. J. Gerrig		4	2
	T. W. Traxler	T. W. Traxler, P.			1
	Court Pharmacy	J. B. Harrel and H. N. Walters	2		
Tampa	Tibbett's Corner	W. H. Tibbets, P.	4	6	
	Val's Corner	Val. M. Antuomo, P	4	1	
		B. L. Robinson, Mgr.			
	Cotter's Pharmacy	Le Roy Cotter, P.	7	7	
Dothan, Ala.	M. A. Ellison Drug Co.	R. C. Ellison			
	McCullom's Drug Store	N. H. McCullom, P.	2	3	
		D. S. Nash, Prescription Clerk			
		Albert Stevenson, disp.			
	Nix Drug Co.	R. Q. Nix, P.	2	3	
	1 call for a "Shot"				
Birmingham	Parker Drug Co.	Roy Armstrong, Mgr.	4	8	
		Geo. W. Griffith, d.			
	John W. Patton Drug Co.	C. Q. Loyd, Mgr.	1		
	Adam's Pharmacy	A. R. Moody, Mgr.	3	3	

ns	Proprietors, Managers and Dispensers	Calls for Dope	Calls for Coke	Calls for Coca-Cola	Misc. Calls
29	160	150	26	120	1

Consumer's Tests About 22.

429 Out of the twenty-two customers' tests, there were 1320 calls for "Coca-Cola," 1639 calls for "Dope," 104 calls for "Coke," 29 miscellaneous calls. In each instance ("Dope" and "Coke" or miscellaneous) the dispenser asked the consumer "Coca-Cola"? or "Do you mean "Coca-Cola?" " and the customer replied in each instance in the affirmative.

426 The following is a tabulation of the witness Boswell's Consumer's Tests at the fountains in the following places during the time specified in the presence of the witness. Every person using the word "Coke" and "Dope" in ordering was asked by the dispenser what he meant and in each instance the answer was "Coca-Cola." The first column indicates the page of the record. The second the name of the town . The third the name of the store. The fourth the number of calls for "Coca-Cola." The fifth the number of calls for "Dope." The sixth the number of calls for "Coke."

			CC	D	C
427	Corinth, Miss.	Dr.M.M.McAnnis' Drug Store	62	103	12
	Holly Springs	D. J. Oliver	27	21	3
	Pontotoc, Miss.	C. D. Mitchell & Co.	37	5	3
	Oxford, Miss.	Chilton Drug Store	46	32	6
	Montgomery, Ala.	G. M. Chatfield Drug Co. Disp. Wilkins, Rankin, White, Bradford	51	41	9
	Montgomery, Ala.	J. Johnson Moore: Disp. Wade Pruitt and Carter Masten	41	64	1
	Montgomery, Ala.	May's Bakery and Confectionery (20min.)	3	1	
	Selma, Ala.	Rockmill Bros.	22	20	
		C. H. Hurley			
		J. Eagle			
	Pensacola, Fla.	Central Pharmacy	8	6	3
		Mgr. Mr. Scott			
		Disp. C. E. Bond			
		R. T. Shuttleworth			
		Dixie Golden			
	Tallahassee, Fla.	Holmes Drug Co.	16	27	
		Prop. J. E. McNair			
		Disp. J. C. Savage			
		J. R. Hartsfield			

		CC	D	C
Lake City, Fla.	A. R. Wise & Co. Disp. J. L. Reims Wilbur Townsend	10	14	4
Jacksonville, Fla.	Clark's Drug Store E. C. Clark, Mgr. Disp.: R. H. Holmes Wm. Holmes R. Scott H. T. Stone	178	139	6
Palatka, Fla.	City Drug Co. Prop. J. H. Haughton Disp.: R. B. Holden N. O. Riles Pelton Wilkerson	5	11	
Ocala, Fla.	Court Pharmacy Prop. J. B. Harrell Disp.: J. W. Dewey Bedford Caldwell Sam Burford	22	32	3
Tampa, Fla.	Cotter's Pharmacy Prop. Le Roy Cotter Disp.: Harry B. Davis H. C. Brannan B. C. Knight Roy Hanter Carter C. Loyd	107	142	3
Dothan, Ala.	Nix Drug Co. Prop. R. Q. Nix Disp.: O. W. Sagg Harvey Gover	15	21	
Birmingham, Ala.	John W. Patton Drug Co. Mgr. C. A. Loyd Disp.: J. E. Curry Vance Thompson W. D. Calloway	65	40	3
Birmingham	Adams' Pharmacy A. R. Moody, Mgr. Disp.: R. T. Wimson R. A. Pruitt H. L. Cage	265	425	27

(Also 13 calls for "Shot," 2 calls for "Shot-in-the-arm;" 1 call for "Candler's High-Ball;" 2 calls for "One-with and one-without.")

DAVID EMORY BOLTON (Rec., 399):

Towns visited: Augusta, Ga., Aiken, S. C., Blackville, S. C., Barnwell, S. C., Allendale, Denmark, Bamberg, Branchville, Orangeburg, St. Matthews, Columbia, Newberry, Clinton, Laurens, Enoree, Greenwood, Abbeville, Belton, Pelzer, Anderson, Seneca, Westminster, Easley, Greenville, Spartanburg, Gaffney and Blacksburg, S. C. Charlotte, Winston-Salem, Greensboro, N. C. Danville, Va. Raleigh, Wilming-

ton, N. C. Norfolk, Va., Petersburg, Richmond, Alexandria, Lynchburg, Va. Asheville, N. C., Charlottesville, Front Royal, Va., Petersburg, W. Va., Reidsville and Salisbury, N. C.

The following table indicates the places where the witness called for "Coca-Cola," "Coke" and "Dope" on separate occasions and observed customers using these same words. All were served with drinks made from syrup drawn from one and the same container. (*Indicates that the container was marked "Coca-Cola.") The proprietor and dispenser in each instance was interviewed and stated that "Coke" and "Dope" were understood to mean "Coca-Cola."

	Town	Store	Prop. or Dispenser
402	Augusta, Ga.	Howard Drug Store No. 1	Mr. Howard, Prop. Earl Cummins, disp.
	Augusta	*Howard Drug Store No. 2	Mr. Howard T. H. Garfield, disp.
	Augusta	T. A. Cardell	Mr. Cardell Nathaniel Fairbrother, disp.
	Augusta	Watson Drug Co.	Jacob Watson F. G. Allen, disp.
	Augusta	The Model Gro. Store	Mr. Holmes, Prop.
	Augusta	H. J. Morkwater	Mr. Morkwater
	Aiken, S. C.	Hall's Pharmacy	Mr. Henderson, Mgr.
	Aiken	Sanders' Pharmacy	Mr. Sanders, Prop.
	Aiken	Mr. Overstreet	Mr. Overstreet, Prop.
	Blackville	Hotel Pharmacy	Mr. Wesenger, Mgr. or Prop.
	Blackville	E. D. F. Pharmacy	Mr. Epps, Mgr.
	Barnwell	Deason Drug Co.	O. A. Best, disp.
	Barnwell	F. H. Huggins Drug Store	
	Allendale	Searson's Drug Store	R. B. Searson, Prop.
	Denmark	Denmark Drug Co.	Mr. Willis, Mgr.
	Bamberg	Mack's Drug	Mr. McCracken, Mgr.
	Bamberg	Peoples Drug Co.	Mr. J. T. Kelly, Mgr.
	Branchville	Steedly's Soda Fountain	W. D. Steedly, Prop. and disp.
	Orangeburg	Lowman Drug Co.	W. A. Cherry, Mgr.
	Orangeburg	Doyle Drug Co.	M. S. Williams, Mgr.
	St. Mathews	Fair's Pharmacy	W. W. Fair, Mgr.
	Columbia	Hudkins Drug Co.	Manager or Prop.
	Columbia	Brim & Little Drug Co.	Manager or Prop.
	Columbia	Mirt Drug Co.	Manager or Prop.
	Columbia	Pinkussohn Ciger Co.	Manager or Prop.
	Columbia	Taylor Drug Co.	Manager or Prop.
	Columbia	Heywood's Pharmacy	Manager or Prop.

	Newberry	Newberry Drug Co.	W. O. Mills, Mfr.
	Newberry	Gilder & Weaks Drug Co.	C. D. Weaks, Mgr.
	Clinton	Clinton Pharmacy	W. C. Harper, Mgr.
	Clinton	Young's Pharmacy	J. H. Young, Prop.
	Laurens	Ray's Pharmacy	C. K. Ray, Mgr.
	Laurens	Ramsey's Pharmacy	B. F. Ramsey, Prop.
	Enoree	Enoree Drug Co.	M. S. Dantzler, Mgr.
	Greenwood	Oregon Drug Co.	E. L. Morris, Mgr.
	Greenwood	Greenwood Candy Kitchen	Geo. Alexas, Mgr.
	Abbeville	Mulford Drug Co.	C. A. Mulford, Mgr.
403	Abbeville	Abbeville Candy Kitchen	Steve Parthenos, Prop. and Mgr.
	Belton	Donald Wilson Drug Store	G. S. Cuthbert, Mgr.
	Pelzer	Griffin Drug Co.	W. W. Griffin, Mgr.
	Anderson	Red Cross Drug Store	L. W. Seals, Mgr.
	Anderson	Evans Pharmacy	W. N. Webb, Mgr.
	Seneca	Seneca Pharmacy	T. L. Stribbling, Mgr. and Prop.
	Columbia		
	Westminster	Stonecypher	J. H. Stonecypher, Mgr.
	Easley	R. F. Smith Drug Co.	Wm. Wyatt, Mgr.
	Greenville	Armstrong Drug Co.	J. C. Armstrong, Mgr.
	Greenville	Doster-Bruce Drug Co.	O. L. Doster, Mgr.
	Greenville	Candyland Ice Cream Parlor	E. S. Bellinger, Mgr.
	Greenville	Sloan Drug Co.	Thomas Sloan, Prop.
	Spartanburg	K. W. N. Pharmacy	Thomas H. Leber, Mgr.
	Spartanburg	Green Drug Co.	J. E. Green, Mgr.
	Spartanburg	Acropolis Ice Cream Parlor	Steve Bakades, Mgr.
	Spartanburg	Elite Ice Cream Parlor	J. A. Metropolis, Mgr.
	Gaffney	Cherokee Drug Co.	J. N. Littlejohn, Mgr.
	Gaffney	Gaffney Drug Co.	J. C. Greech, Mgr.
	Blacksburg	Cousins Drug Co.	W. G. Cousins, Mgr.
	Blacksburg	Iron City Drug Co.	T. S. R. Ward, Prop.
	Charlotte, N. C.	Jordan's Drug Store	
	Charlotte	Moody Drug Co.	E. J. Caton, Mgr.
	Charlotte	Jas. P. Stowe Drug Co.	Jas. P. Stowe, Mgr.
	Charlotte	Charlotte Drug Co.	Mr. McLarkin. Mr. Bullock, Prop.
	Winston-Salem	O. Hanlon's Drug Store	E. W. O. Hanlon, Prop.
	Winston-Salem	Thompson Drug Store	P. A. Thompson, Prop.
	Winston-Salem	Owens Drug Co.	P. J. Brain, Mgr.
	Winston-Salem	Hutchins Drug Co.	R. L. Hutchins, Mgr.
	Greensboro	Grissom Drug Co.	E. G. Bowers, Mgr.
	Greensboro	Sykes Drug Co.	E. C. Sykes, Mgr.
	Greensboro	Greensboro Drug Co.	Wm. Johnson, Mgr.
	Greensboro	Conyers & Sykes Drug Co.	R. J. Sykes, Mgr.
	Danville, Va.	E. M. Wallace Drug Co.	E. M. Wallace, Prop.
	Danville	Danville Drug Co.	Harry W. Thomas, Mgr.
	Danville	Jacobs Drug Co.	J. D. Pruitt, Prop.
	Raleigh, N. C.	Thomas & Son Drug Co.	Wm. G. Thomas
	Raleigh	Tucker Bldg. Pharmacy	Gilbert Crabtree, Mgr.
	Raleigh	Brantley Drug Co.	J. C. Brantley, Prop.
	Raleigh	Wake Drug Co.	J. T. Moore, Mgr.
404	Wilmington	Orton Confectionery Co.	E. Dinos, Prop.
	Wilmington	Hicks-Bunting Drug Co.	
	Wilmington	Woodall-Sheppard Drug Co.	H. M. Cox, Mgr.
	Wilmington	Elvington Pharmacy	D. A. Elvington, Owner
	Norfolk, Va.	Martin's Pharmacy	
	Norfolk	Cummings Confectionery Store	Louis Cummings, Mgr.
	Norfolk	Burrow-Martin Drug Co.	J. T. Powell, Mgr.
	Norfolk	Truitt's Pharmacy	C. F. Truitt, Prop.

Petersburg	Morrison Drug Co.	J. A. Morrison, Prop.
Petersburg	Harrison Drug Co.	J. B. Harrison, Prop.
Petersburg	Palms Confectionery Co.	W. G. Roberts, Mgr.
Richmond	Muller Drug Co.	T. A. Muller
Richmond	Blair's Drug Store	
Richmond	Crenshaw Cigar Co.	W. D. Crenshaw
Richmond	McKay Cigar Co.	T. R. Ennos, Mgr.
Richmond	Grant Drug Co.	W. S. Cavedo, Mgr.
Alexandria	Warfield Drug Co.	Edgar Warfield, Jr., Prop.
Alexandria	Gubson Drug Co.	Richard Gubson
Lynchburg	Boston Confectionery	Lewis Vaynes, Prop.
Lynchburg	Craghill Jones Drug Co.	J. P. Jones, Mgr.
Lynchburg	Lamber's Pharmacy	E. D. Williams, Mgr.
Asheville, N. C.	Globe Cafe & Candy Kitchen	H. C. Theobald, Mgr.
Asheville	Raysor Drug Co.	C. A. Raysor
Asheville	Carmichael Pharmacy	R. C. Hawkins, Mgr.
Asheville	Smith's Drug Co.	Frank Smith, Mgr.
Charlottesville, Va.	Pence & Sterling Drug Co.	R. S. J. Sterling, Mgr.
Charlottesville	Fitzhugh Bros. Drug Co.	J. S. Fitzhugh, Mgr.
Charlottesville	Robert E. Clark Drug Store	Robert Clark, Prop.
Front Royal	Trout & Turner Drug Co.	M. B. Turner, Mgr.
Front Royal	Venable's Drug Store	C. M. Venable, Prop.
Petersburg, W. Va.	Wise Grocery Store	W. C. Wise, Prop.
Petersburg	Judy & Mooman Drug Co.	G. Mooman, Mgr.
Reidsville, N. C.	Tucker Drug Co.	R. H. Tucker, Prop.
Reidsville	Gardner Drug Co.	T. L. Gardner, Prop.
Salisbury	Main Pharmacy	Stamy Carter, Mgr.
Salisbury	Peoples Drug Co.	J. R. Trotter, Mgr.
Salisbury	Smith Drug Co.	Sam Carter, Mgr.

405 At the fountains of the following places, in the presence of the witness, every person using the word "Coke" and "Dope" in ordering drinks was asked by the dispenser what he meant, and in each instance the answer was "Coca-Cola." The first column indicates the page of the record. The second column indicates the name of the town. The third column indicates the name of the fountain. The fourth column indicates the name of the dispenser. The fifth column the number of calls for "Coca-Cola" observed. The sixth column the number of calls for "Dope" observed. The seventh column the number of calls for "Coke" observed.

			CC	D
36 Blackville, S. C.	Hotel Pharmacy	T. D. Box, disp.	8	22
Barnwell	Deason Drug Store	O. A. Best, disp.		
Allendale	Searson's Drug Store	F. H. Farmer, disp.		18
Denmark	Denmark Drug Co.	Willis, Mgr.		6
Bamberg	Macks Drug Store	Luke Curry, disp.		27
Orangeburg	Loman Drug Co.	Ed Langley		57
St. Mathews	Fair's Pharmacy	Dixon Whitstone, disp.		28
Columbia	Hudgins Drug Store	H. G. Sistrunk, disp.		43
Columbia	Taylor Drug Co.	J. C. Bruce, disp.		62
Newberry	Newberry Drug Co.	Dispenser		34
Clinton		Guy Mayson		33
Laurens	Ray's Pharmacy	Dispenser		61
Greenwood	Greenwood Candy Kitchen	Mr. Alexas, Prop. and disp.		47
Abbeville	Abbeville Candy Kitchen	Steve Parthenos, Prop. and Mgr.		29
Belton	Donald Wilson Drug Co.	Lewis Cox, disp.		32
Anderson	Evans Pharmacy	Will Adams		41
Greenville	Armstrong Drug Co.	J. A. Rebow, disp.		38
Greenville	Candyland Ice Cream Parlor	Steve Georgon, disp.		51
Spartanburg	Acropolis Ice Cream Parlor	E. C. Morrow, disp.		22
Gaffney	Cherokee Drug Co.	Dispenser		27
Blacksburg	Iron City Drug Co.	Geo. Roberts, disp.		31
Charlotte, N. C.	Charlotte Drug Co.	J. T. Neighbors, disp.		26
Winston-Salem	Owens Drug Co.	L. L. Nunn, disp.		17
Greensboro,N.C.	Conyers & Sykes Drug Co.	K. C. Clendein, disp.		51
Raleigh	J. C. Brantley Drug Co.	P. D. Gattis, disp.		37
Danville, Va.	Jacobs Drug Co.	Loyd Bray, disp.		21
Wilmington,N.C.	Elvington Pharmacy	W. B. Wilson		26
Norfolk, Va.	Cummings Confectionery	Chas. Taylor, disp.		18
Petersburg	Palm Confectionery Store	W. J. Adams, disp.		12
Richmond	Grant Drug Co.	E. M. Farris, disp.		38
Alexandria	Gibson Drug Co.	W. L. Arnold, disp.		18
Lynchburg	Craghill-Jones	E. E. McDaniel, disp.		12
Asheville, N. C.	Carmichael Pharmacy	J. C. Brown, Jr., disp.		18
Charlottesville, Va.	Pence & Sterling Drug Co.	W. R. Munday, disp.		12
Front Royal	Trout & Turner Drug Co.	L. J. Fristo, disp.		8
Reidsville, N. C.	Tucker Drug Co.	J. W. Burrus, disp.		5
Salisbury	Main Pharmacy	L. D. Joyner, disp.		9

SAM FRIEND (Rec., 836):

Towns visited: Griffin, Barnesville, Macon, Conyers, Covington, Monroe, Winder, Lawrenceville, Buford, Roswell, Gainesville, Toccoa, Royston, Athens, Elberton, Madison, Greensberg, Washington, Thomson, Warrenton, Milledgeville, Jonesboro, Locust Grove, Stockbridge, McDonough, Jackson, Flovilla, Monticello, Eatonton, Montezuma, Marshallville, Americus, Dawson, Ellaville, Cuthbert, Buenta

Vista, Albany, Ashburn, Moultrie, Douglas, Fitzgerald, Giolla, Sylvester, Cordele, Ft. Gaines, Blakely, Bainbridge, Adel, Donaldsonville, Thomasville, Pelham, Camilla, Meigs, Quitman, Boston, Valdosta, Waycross, Georgia. Dallas, Houston, San Antonio, New Braunfels, San Marcos, Austin, Taylor, Temple, Belton, Ennis, Corsicana, Texas.

Friend called at the folowing places for "Coca-Cola," "Coke" and "Dope" on separate occasions and observed customers using the same words. In each instance he and they were served with drinks made from syrup drawn from one and the same container. (*Indicates container was marked "Coca-Cola.")

837 The first column indicates the page of the record. The second the name of the town. The third the name of the store, the fourth the length of time during which the witness stayed about the fountain and observed the calls of customers. The fifth the number of calls for "Coca-Cola." The sixth the number of calls for "Dope." The seventh the number of calls for "Coke" during the period of the witness' observation.

			hr.	min.	CC	D	C
		*Brooks County Drug Store	1	25	7	9	
838	Griffin, Ga.	*Carlisle & Ward		55	5	7	
		Derrick Drug Co.		55	2	6	
		R. N. Mitchell Drug Store		35	6	5	
	Barnesville	J. H. Blackburn	1	10	3	6	
		Barnesville Drug Co.		55	4	5	
		Anderson Drug Co.		50	3	6	
		Barnesville Drug Co.		55	4	3	
		Anderson Drug Co.		35	2	4	
		J. H. Blackburn Drug Co.		40	3	5	
	Macon	Saunders Drug Co.	1	20	5	11	
		Chapman's Drug Store	1	20	5	11	
		Taylor & Bayne Drug Co.	1	15	9	11	
		J. H. Lamar Drug Co.	1	15	5	6	
		Murray & Sparks Drug Co.	1	30	14	5	
		King & Oliphant Drug Co.	1	05	8	8	

			hr.	min.	CC	D
		L. C. Small Drug Co.	1	20	5	11
		Saunders Drug Co.		20	2	2
		Chapman's Drug Store		15	1	2
		Taylor & Bayne Drug Co.		20	1	3
	Conyers	W. H. Lee Drug Co.	1	20	3	6
		Street's Drug Store		55	3	4
	Social Circle	Knox Pharmacy	1	25	5	3
	Covington	Smith's Drug Store	1	20	3	7
	Covington	City Pharmacy		50	4	12
		C. C. Brooks	1	25	4	9
	Monroe	Carmichael Drug Co.	1	30	5	8
		W. S. Stovall	1	25	4	7
		Chaffin Drug Co.	1	05	6	7
	Winder	G. W. De Lapierlere & Sons	1	15	4	6
		J. T. Wages' Drug Store		45	3	7
		L. E. Herren's Drug Store	1	15	2	6
839	Lawrenceville	Ezzard-Montgomery Drug Co.	1		2	5
		Kelley Drug Co.	1		5	6
	Buford	Buford Pharmacy	1	10	3	3
		Prater & Murphy	1	10	3	4
		J. T. Rowe Drug Co.		50	2	3
	Roswell	Roswell Drug Co.		55	2	4
		J. G. Potter Drug Store	1	10	2	3
	Gainesville	Piedmont Drug Co.	1		3	7
		Robertson Drug Co.	1	20	3	4
		Stringer's Ice Cream Parlor	1	15	4	7
	Toccoa	Barron Bros. Ice Cream Parlor	1		3	4
		*Peoples Drug Store	1	15	3	5
	Royston	Ridgeway Drug Co.	1	30	5	5
		Royston Drug Co.	1	20	4	4
	Athens	*Poss' Place	1	25	5	10
		*Bland Bros.	1		2	4
		*Costa's Place	1	05	7	15
		*M. & W. Cigar Co.	1	15	5	8
	Elberton	*Herndon's Drug Store	1	10	4	7
		*Cleveland Drug Co.	1	05	4	6
		Rapley & Manley	1	15	4	5
	Madison	*Atkinson Drug Co.	1	45	5	2
		*Tunnison's Phar.	1	35	4	5
	Greensboro	*Rice Drug Co.	1	30	6	4
		Armour Drug Co.	1	05	4	5
	Washington	*Moore Bros.	1	30	2	4
		J. B. Green	2	10	3	6
	Thomson	A. J. Matthews	1	45	3	4
		*Gibson Drug Co.	1	25	4	5
	Warrenton	*Evans Drug Co.	1	30	2	4
		*Baker's Soft Drink Stand	1	35	3	7
	Milledgeville	*Culver & Kidd	1	15	3	6
		Barrett's Drug Store	1	10	2	6
		Ennis Drug Co.	1	30	5	5
	Jonesboro	Cousins Drug Co.		50	2	2
	Locust Grove	Locust Grove Drug Co.		50	2	2
	Stockbridge	Ward Drug Co.	1	45	1	
	McDonough	*McDonough Drug Co.	1	35	3	2
840		*Horton Drug Co.	1	25	2	3
	Jackson	*The Owl Drug Co.	1	20	5	4
		*Slaton Drug Co.	1	15	6	5
		Woods & Carmichael Drug Co.	1	15	4	9
	Flovilla	*A. F. White Drug Co.	1	25	4	8
	Monticello	Furse Drug Co.	1	40	6	6

			hr.	min.	CC	D
		*Jordan Drug Co.	1	40	5	9
	Eatonton	*Belvin's Drug Store	1		3	3
	Eatonton	*Central Pharmacy	1	20	2	4
		*D. L. Thomas Drug Store	1	05	4	4
	Montezuma	*A. C. Richardson & Son	1	25	3	4
		*Read's Drug Store	1	25	3	6
		Walker Drug Co.	1	15	5	4
	Marshallville	*Booton's Drug Store	1	30	1	2
	Americus	Howell & Prather	1	30	4	10
		Hook's Drug Store	1	45	5	11
	Dawson	*Tanner Drug Co.	1	15	4	5
		*City Pharmacy	1	25	4	7
		*Dawson Drug Co.	1	20	1	5
	Ellaville	*City Drug Store	1	30	1	1
	Cuthbert	Moore Drug Co.	1	20	3	4
		*Zuber's Soft Drink Stand	1	15	6	11
	Buena Vista	*City Drug Store	1		2	3
	Albany	*Albany Drug Co.	1	20	5	9
		*Royal Ice Cream Parlor	1	15	8	9
		Cash Drug Store	1	15	7	12
		Bell Drug Co.	1	05	7	12
	Ashburn	*Ashburn Drug Co.	1	30	2	6
	Tipton	Mills Drug Co.	1	35	4	7
		*Peoples Ice Cream Parlor	1	25	5	9
		Brooks Drug Store	1	20	3	7
	Moultrie	*Williams Drug Co.	1	25	2	5
	Moultrie	Watson Drug Co.	1	15	2	7
		Hawkins Drug Store	1	05	5	9
	Douglas	Farmer's Drug Store	1	25	3	7
	Douglas	*Sapps Drug Store	1	15	6	6
		*Union Pharmacy	1	30	3	6
	Fitzgerald	*Goodman Drug Co.	1	35	1	4
		*Dixie Pharmacy	1	15	1	6
		National Drug Co.	1	30	3	6
		Adams Candy Kitchen	1	05	1	6
841	Ocilla	City Drug Store		50		2
		Ocilla Pharmacy	1	20	2	6
	Sylvester	Cash Drug Store	1	10	1	3
		*Bell & Lee Drug Co.		55	2	1
	Cordele	*Cash Drug Store	1	35	3	6
		*Williams Drug Co.	1	15	5	9
		*Stead's Drug Store	1	15	3	9
	Ft. Gaines	*People's Drug Store	1	30	3	11
		John Brown's Place	1	20	8	12
	Blakely	Morris Drug Co.		50	1	3
		*Fryer's Pharmacy		50	1	3
	Bainbridge	Oak City Drug Co.	1	35	1	5
		Bainbridge Pharmacy	1	20	1	4
		Mills Drug Store		15	7	12
	Adel	Adel Drug Co.	1	30	3	6
	Donaldsonville	Palace Pharmacy	1	15	1	4
	Thomasville	*Peacock & Nash Drug Co.	1	10	3	8
		City Drug Store	1	05	4	9
		Ingram Drug Co.	1	25	6	12
	Pelham	Hill & King Pharmacy	1	30	2	6
		Consolidated Drug Co.		50	2	6
	Camilla, Ga.	Camilla Drug Co.	1		3	2
		Stripling's Pharmacy		50	4	3
	Meigs	The Rexall Store		45		1
		Iselar's Pharmacy	1			1

		hr.	min.	CC	D	C
Quitman	Horn Drug Co.	1	15	2	5	
	*Savoy Soft Drink Stand	1	10	3	8	
	Brooks County Drug Co.	1	20	3	5	
Boston	City Drug Co.	1	15	1	4	
Valdosta	Vinson Drug Co.	1	10	4	8	
	*Ingram Drug Co.	1	15	5	10	
	Dunnaway's Pharmacy	1	35	1	5	
	Barnes Drug Co.	1	15	6	9	
	Mackey Soft Drink Stand	1	10	4	9	
	Bergstrom & Newberg	1		6	10	
Waycross	*Mills Drug Co.	1		5	5	
	*Spear & Register Drug Co.	1	10	3	6	
	Cherokee Pharmacy	1	15	3	4	
Dallas, Tex.	Cecil V. Rogers Drug Store	1	20	8		13
842	*Britton's Drug Store	1	15	11		11
	*Dimitri & Nimich	1	20	15		24
	*St. George Drug Store	1	15	7		15
	*Southland Pharmacy	1	25	21		39
	Thomas' Candy Kitchen		40	7		11
	Thomas' Candy Kitchen		50	8		14
	Moss' Pharmacy		30	2		5
	Princess Confectionery Store		30	3		
	Marvin's Drug Store		35	5		7
	Tate Drug Store		30	4		2
	Moss' Pharmacy No. 2		30	1		2
	*Ewer Drug Co.		35	1		3
	Hippodrome Confectionery		25	3		4
	*J. A. Skillern & Sons		25	2		5
	Central Drug Store		30	1		1
	*Moore's Commerce Pharmacy		30	2		2
	*Capitol Drug Store		45	2		2
	Bullington Drug Store		30	1		3
	*Treadwell Drug Co.		45	3		2
	Dallas Pharmacy		30	3		1
	*J. A. Skillern & Sons No. 3		30	3		2
	*Oak Cliff Pharmacy		30	2		1
	Furlow Linder		25	1		3
	Red Cross Pharmacy		25	3		1
	Arcade Confectionery		30	1		3
	Texas Cigar Co.		30	4		4
	*Washington Ave. Pharmacy		30	1		2
	Cormick Drug Co.		30	2		3
	J. A. Skillern No. 2		20	2		4
	*Atha's Place		25			2
	Cossu's Place		25	1		3
	Sanger Bros.		25	4		8
	Craig's Place		20	1		
	Imperial Pharmacy		20	1		3
	*Rhinelander's Pharmacy		30	2		4
	*Allen's Pharmacy		30	2		1
	*Stovall's Pharmacy		20	1		3
	*Wimans Pharmacy		25	2		1
	Grand Ave. Pharmacy		25	2		1
	*Cantor's Pharmacy		30	2		2
	Second Avenue Pharmacy		30			1
843	*Smoot & Crow Drug Store		35	1		1
	Fair & Park Drug Store		25	1		2
	*Guy's Pharmacy No. 2		35	1		2
	*McGwier's Pharmacy		25	1		1
	*Robertson Drug Co.		25	3		2

		min.	CC	D	C
	Wilson Drug Store	15	1		1
	Hindley's Pharmacy	15			1
	Bradley's Pharmacy	15	2		3
	*Clayton's Pharmacy	20	1		1
	*Canter's Drug Store No. 2	20			1
	*Kirby's Drug Store	20	1		2
	*Green's Drug Store No. 1	20	2		2
	*Green's Drug Store No. 2	20	1		1
	English Pharmacy	15	2		3
	Eagle Pharmacy	20	1		2
	McFarland's Drug Store	15	2		2
	*Tremont Pharmacy	15	1		2
	Justice Pharmacy	15	2		2
	Welchsel Pharmacy	20	2		2
	High School Drug Store	15	2		2
	Medlock's Pharmacy	15	1		1
	*Springfield Drug Store	20	2		2
	E. J. Rust & Bros.	15			1
	*Clark's Pharmacy	15	1		1
	Linder's Pharmacy	20			1
	Guy's Pharmacy	15	2		2
Houston, Tex.	*Anderson Drug Co.	25	3	1	5
	*Woods-Ehrhart Drug Co.	25	2		3
	McFarland's Phar.	30	2		2
	Bennett's Phar.	30	1		2
	*South End Pharmacy	35	1		2
	Hoencke Pharmacy	40	2		2
	Hoencke Pharmacy No. 2	30	1		1
	*Anita Pharmacy	30	1		2
	Ridley's Pharmacy	30	2		1
	*City Drug Store	20	1		2
	*Manhattan Confectionery	40	2		2
	*Public Drug Store	30	2		4
	The Rouse Drug Co.	30	2		6
844	*Rouse Drug Co. No. 2	25	3		4
	Rice Annex Drug Store	25	5		3
	Pappas Bros. Confectionery	30	6		10
	Burgheim's Phar.	25	2		4
	*Hendrix Phar.	20	1		2
	*Grasse Drug Co.	35	1		2
	Spears Drug Store	25	1		1
	*Magnolia Phar.	25	1		2
	*Cockrell's Phar.	25	2		3
	*Post Office Pharmacy	35	4		2
	*Wicks & Co.	30	2		8
	Olympia Candy Kitchen	30	5		12
	Clay & Gilpin	25	1		2
	*Griffin's Pharmacy	20	1		1
	*Keisling Pharmacy	30	3	1	5
	*Cockrell's Pharmacy	25	1		2
San Antonio	Milburn Bros. Pharmacy	35	2		5
	*Busy Bee Candy Kitchen	25	2	1	5
	Summers Drug Store No. 1	25	3		4
	Summers Drug Store No. 2	25	1	2	3
	*Whisenant Drug Co.	20	6		4
	Burns Drug Store	30	2		4
	*Pfeiffer's Cut-Rate Drug Store	25	2	1	2
	*George Keen's Drug Store	30	5		4
	*Twentieth Century Drug Store	30	0	1	1
	*Kalteyer & Sons	35	1		1

		min.	CC	D	C
	Taliaferro's Phar.	20	2		3
	*Marshall Johnson's Phar.	30	1		1
	Chapin's Phar.	15	1		1
	Dreiss Drug Store	30	2	1	2
	*Quillian Confectionery	25	4	1	3
	*Palace of Sweets	25	1		1
	Wagner Pharmacy	25	5		3
	*Kalteyer's Pharm.	25	2		2
	*Fisher's Drug Store	30	1		3
	Crutcher-Threadgill Phar.	30	1		1
New Braunfels	*Ritcher's Phar.	30	1		1
	Sippel's Confectionery	45	1		3
	Walter Sippel's Confectionery	30	1		3
San Marcos	Story's Confectionery	50	2		2
	Vinson's Pharm.	25	1		2
	McIntyre's Confectionery	30	2		3
Austin	*Van Duris Confectionery	30	2		4
	*Gates & Cornwell Drug Store	35	1		3
	Crescent Confectionery	30	2		5
	Griffith Drug Co.	30	3		4
	Van Smith's Phar.	35	4		6
	*Johnson's Phar.	25	1		2
	Jeff. S. Wimbish Phar.	25	1		1
Taylor	Lyle's Phar.	45	1		2
	*Metropole Confectionery	35	2		2
	Friend's Palace	30	3		3
	*Dalliet's Phar.	30	1		2
Temple	Olympia Confectionery	35	3		6
	Mississippi Dept. Store	45	5		8
	*Power's Drug Store	25	1		2
	*Square Drug Store	25	2		2
	*Zacharias Confectionery	30	5		3
	Willis & McLean	25	2		2
	G. L. Reynolds Drug Store	40	4		7
Belton	Melot Bros.	30	2		4
	Olympia Candy Kitchen	30	2		5
	Head Drug Co.	40	2		2
Ennis	*Castellaw Drug Co.	25	2		4
	*John L. Stevenson Drug Store	20	2		1
	*Ennis Drug Co.	35	2		2
	*Glover & Guthrie Drug Co.	25	1		3
	Hesser's Phar.	25	2		4
	*Cunningham's Confectionery	30	1	1	2
Corsicana	Commercial Drug Store	25	2		2
	Owen Matthews Drug Store	35	1		3
	Harper & Inabnit	30	2		3
	Lawson Colson's Drug Store	30	1		3
	Beaton & Bagby	30	1		2
	*John Merchison	25	2		2
	Fifth Avenue Confectionery	25	1		3

346 At the fountains at the following places, during the time specified, in the presence of the witness, every person using the word "Coke" or "Dope" in ordering was asked by the dispenser what he meant and in each instance the answer was "Coca-Cola."

The first column indicates the page of the record. The second the name of the town. The third the name of the store. The fourth the name of the dispenser. The fifth the length of time during which the test was conducted. The sixth the number of persons calling for "Dope." The seventh the number of persons calling for "Coke."

			Dispenser	hr.	min.	D	C
847	Macon, Ga.	Saunders Drug Co.	Spencer Phillips	7	30	30	
	Gainesville	Piedmont Drug Co.	Jones	4	30	15	
	Royston	Ridgeway Drug Co.	Bennett	4		11	
	Athens	Poss' Place	Smith	5	30	36	
	Elberton	Herndon's Drug Store	Maxwell	3	30	16	
	Madison	Atkinson Drug Co.	Atkinson	4	30	8	
	Greensboro	Rice Drug Co.	Crumley	4	30	10	
	Washington	Moore Bros.	Corry	4	30	9	
	Thomson	Gibson Drug Co.	Johnson	3	30	10	
	Warrenton	Baker's Soft Drink Stand	Mangrine, Jr.	3		8	
	Milledgeville	Ennis Drug Co.	Benford	4		14	
	McDonough	Horton Drug Co.	Elliott	3		8	
	Jackson	Woods&CarmichaelDrugCo.	Maddox&Furlow	3		14	
	Flovilla	A. F. White Drug Co.	Harding	3	30	15	
	Monticello	Jordan Drug Co.	Robinson	3	30	11	
	Eatonton	Belvin's Drug Store	Wheeler	2	30	14	
	Montezuma	Walker Drug Co.	Walker	3	30	22	
	Americus	Hook's Drug Store	Wheeler	4	30	18	
	Dawson	Dawson Drug Co.	McDowell	3		9	
	Cuthbert	Zuber's Soft Drink Stand	McDaniel	3		14	
	Albany	Bell Drug Co.	McDaniel	4		24	
	Ashburn	Ashburn Drug Co.	Faircloth	3	30	17	
	Tipton	Brooks Drug Store	Thrasher	3		12	
	Moultrie, Ga.	Hawkins Drug Store	Powell	3		17	
	Douglas	Union Pharmacy	Coleman	3		12	
	Fitzgerald	Adams Candy Kitchen	Adams	3		15	
			Dispenser	hr.	min.	D	C
	Ocilla	Ocilla Pharmacy	Smith	4		12	
	Cordele	Stead's Drug Store	Hughes	3	20	15	
	Ft. Gaines	John Brown's Place	Graham	4		30	
	Bainbridge	Mills Drug Store	Welch	3	30	30	
	Adel	Adel Drug Co.	Gunn	3		11	
	Thomasville	Ingram Drug Co.	Pate	4		24	
	Pelham	Consolidated Drug Co.	Mitchell	3	35	17	
	Camilla	Stripling's Pharm.	Stripling	3		14	
	Quitman	Horn Drug Co.	Dobbs	2	45	12	
	Valdosta	Bergstrom & Newberg	Pope	3		18	
	Waycross	Cherokee Pharmacy	Sutton	3		14	
	Dallas, Texas	Southland Pharmacy	Arrant	6			60
	Dallas	St. George Drug Store	McCarty&White	4	15		21
	Dallas	Cecil V. Rogers Drug Store	Asbell	4			12
	Houston	Rouse Drug Co.	Clark	4			36
	Houston	Public Drug Co.	Dent&Englands	3	25		18
	Houston	Wicks & Co.	Grenillion	3	30		21
	Houston	Keisling Pharmacy	Johnson	3			20
	Houston	J. H. Wood's Drug Store	Turner	3	45		15

			hr.	min.	D	C
San Antonio	Summers Drug Co. No. 1	Walker	4		3	42
San Antonio	Quillian Confectionery	Quillian	3			28
San Antonio	Whisenant Drug Co.	Barr	3	10		21
San Antonio	Wagner Drug Store	Sample	3			29
San Antonio	Taliaferro Drug Store	Thurman	3			14
San Antonio	Pfeiffer's Pharmacy	Brass & Pitman	3	30	3	8
Austin	Crescent Confectionery	George	3	30	2	18
Taylor	Dalliet's Pharmacy	Wassinger	4			16
Temple	Willis & McLean	Otto	2	30		17
Ennis	Glover & Guthrie Drug Co.	Rogers	3		1	8
Corsicana	Owen Matthews Drug Store	Croft	2			10
Corsicana	Harper & Inabnit	Martin	2		1	12
Corsicana	Harper & Inabnit	Martin	2			12
Corsicana	LawsonColson'sDrug Store	Griffin	2			17

349 Friend visited 71 towns, heard 997 calls for "Coca-Cola," 533 calls for "Coke," 987 calls for "Dope." Persons calling for "Dope" and "Coke" were served with a drink made from syrup drawn from the same container as those asking for "Coca-Cola."

692 persons asked for "Dope" and 438 for "Coke" were questioned as to what they meant and each replied "Coca-Cola."

Attention is called to the fact which is apparent from the foregoing tabulations that in Texas the abbreviation Coke is commonly used, the word Dope, seldom, while the reverse is the case in territory east of the Mississippi River.

FREDERICK CONWAY PEACE. (Rec., 683.)

Towns visited: Hattiesburg, Miss., Biloxi, Miss., Bay St. Louis, Miss., Collins, Miss., Poplarville, La., Ellisville, La., New Orleans, La., Denison, Texas, Sherman, Texas, Van Alstyne, Texas, McKinney, Texas, Cleburne, Texas, Fort Worth, Texas, Dallas, Texas, Oak Cliff, Texas, Arlington, Texas, Grand Prairie, Texas.

384 Peace at the soda fountains in the following places on separate occasions called for Coca-Cola, Coke and

Dope and also observed customers using the same words. All were served with drinks made from syrup drawn from one and the same container. (*Indicates that the container was marked "Coca-Cola.")

685	City Drug Store	Hattiesburg, Miss.
	Yellow Pine Drug Store	Hattiesburg
	Fields Drug Co.	Hattiesburg
	Moore Grocery Store	Hattiesburg
	Capdau Drug Co.	New Orleans, La.
	Williams Pharmacy	New Orleans
	Katz & Besthoff	New Orleans
	W. L. Brown Pharmacy	New Orleans
	Peters Pharmacy	New Orleans
	Osenwald & Gross Drug Store	New Orleans
	Kirby Five Cent Store	New Orleans
	Economical Drug Co.	New Orleans
	Louisiana Candy Store	New Orleans
	Cusach's Drug Store	New Orleans
	Katz & Besthoff Store	New Orleans
686	Lopez Confectionery Co.	New Orleans
	F. O. Blaine's Restaurant	New Orleans
	Frank L. Simmons Pharmacy	New Orleans
	Philadelphia Ice Cream Co.	New Orleans
	Power Drug Store	Bay St. Louis, Miss.
	J. A. D'Aquin Drug Co.	Biloxi
	Rush-Grayson Drug Co.	Biloxi
	W. L. Grant Pharmacy	Biloxi
	Porter Pharmacy	Biloxi
	Biloxi News Stand	Biloxi
	Scranton Pharmacy	Pascagoula
	Moore Grocery Store	Pascagoula
	A. E. Voyodzis	Pascagoula
	Pascagoula Pool Room	Pascagoula
	John H. Hill Confectionery Store	Moss Point
	Burnham's Pharmacy	Moss Point
	Southern Paper Co.	Moss Point
	Parlor's Drug Store	Gulf Port
	Day Drug Co.	Gulf Port
	Jones Bros. Drug Store	Gulf Port
	George Lambrakeo's Soda Fountain	Gulf Port
	Stratakos	Gulf Port
	The Imperial Palm Parlor	Gulf Port
	City Drug Store	Lumberton
	T. H. Redmond	Lumberton
	C. Polato Grocery Store	Lumberton
	Poplarville Drug Store	Poplarville
	Collins' Restaurant	Poplarville
	J. W. Bradshaw Grocery Store	Poplarville
	Barry Drug Co.	Columbia
	Barry Bros. Drug Store	Columbia
	Columbia Drug Store	Columbia
687	Walker Bros. Drug Store	Columbia
	Collins' Drug Store	Collins
	Stovall Drug Co.	Collins
	Jones Beacham Restaurant	Collins
	Scott's Restaurant	Hattiesburg

M. W. Hyde Drug Co.	Ellisville
E. J. Ward's Pharmacy	Ellisville
Sam Imbragnglic's	Ellisville
C. A. Abbey & Son's Grocery Store	Ellisville
City Drug Store	Laurel
Hattiesburg Drug Co.	Laurel
Century Drug Store	Laurel
Scruggs' Drug Store	Laurel
T. J. Wallace Drug Co.	Laurel
Pastime Pool Room	Laurel
Waldrop's Pharmacy	Meridian
Renfroe Pharmacy	Meridian
Ware & Kendall's Pharmacy	Meridian
C. J. Woodruff Drug Co.	Meridian
McCorkle Drug Co.	Meridian
Paragon Pharmacy	Meridian
Coleman's Pharmacy	Meridian
Sugerman's Cigar Store	Meridian
C. Camarinos	Sherman, Tex.
Palace of Sweets	Sherman
Carl R. Noll Drug Co.	Sherman
Craycroft & Stinson	Sherman
Langford & Keith Drug Store	Sherman
Watson's	Sherman
Turner's Pharmacy	Sherman
W. L. Bidding Drug Co.	Sherman
People's Pharmacy	Dennison
Kingston Drug Co.	Dennison
Frank Maniolos	Dennison
Reynolds Drug Co.	Dennison
Cross' Drug Co.	Dennison
Tony's Palm Garden	Dennison
Tango	Van Alstyne
Brown-Baker Drug Store	Van Alstyne
J. J. Pitts Soda Fountain	Van Alstyne
City Drug Store	Van Alstyne
Hughes Restaurant	Van Alstyne
Alcove Confectionery	McKinney
Olympia Confectionery Store	McKinney
Mitchell Drug Store	McKinney
Smith's Drug Store	McKinney
Dearmore & Hughes	Van Alstyne
Hanner Drug Co.	Dennison
The Tango	Dennison
Schrodt's Pharmacy	Dallas
C. R. Smith's Pharmacy	Dallas
Empire Drug Co.	Dallas
Palace Drug Store	Dallas
Oriental Drug Store	Dallas
T. J. Britton's Pharmacy	Dallas
Tyler Avenue Pharmacy	Dallas
Davis Confectionery Store	Dallas
Bishop Avenue Pharmacy	Dallas
Crystal Pharmacy	Dallas
Mallory Drug Store	Dallas
Titche & Goettinger	Dallas
Haskell Pharmacy	Dallas
Blain Marshall Drug Store	Dallas
Washington Ave. Pharmacy	Dallas
Kirby & Blakeney's	Dallas

	Flagg Floral & Confectionery Store	Dallas
	North Dallas Drug Co.	Dallas
	Fairmount Pharmacy	Dallas
	Oak Cliff Pharmacy	Dallas
	Gallett & Compton's Drug Store	Dallas
	McKinney Avenue Drug Store	Dallas
	Littlepage Pharmacy	Dallas
	Highland Park Pharmacy	Dallas
	Magnolia Pharmacy	Dallas
	New York Ice Cream Parlor	Dallas
	Gilliland Pharmacy	Dallas
	Oak Lawn Market & Bakery	Dallas
	Thomas' Confectionery Store	Dallas
	Farrow Linder Phar.	Dallas
	Harper Confectionery Store	Grand Prai
	Cooper Drug Store	Grand Prai
	City Drug Store	Grand Prai
	Harry Harris Drug Co.	Cleburne
	Foster & Fain's Drug Store #2	Cleburne
	C. F. Humphreys	Cleburne
	E. J. Campsey Drug Store	Cleburne
	Foster & Fain's Drug Store #1	Cleburne
	G. E. Mecham	Cleburne
	Cyrus & Cyrus	Cleburne
	Crow & Walker's Drug Store	Cleburne
	M. C. Anderson, 700 Penn. Ave.	Fort Worth
	R. A. Anderson, 706 Main St.	Fort Worth
	Bessie Pharmacy, 1001 Bessie St.	Fort Worth
	Bradford Bros., 3200 F Avenue	Fort Worth
	J. P. Broshear, 1300 Main St.	Fort Worth
	Canton Pharmacy, 515 Main St.	Fort Worth
690	Casey's No. 1, 1314 Terrell St.	Fort Worth
	Casey's No. 2, 2338 Hemphill St.	Fort Worth
	Clardy's Drug Store, 1600 Vickery Blvd.	Fort Worth
	College Avenue Pharmacy, 1730 College St.	Fort Worth
	Corner Drug Store, 1215 Cahoun St.	Fort Worth
	Jack Coulson, 101 North Houston St.	Fort Worth
	Coney & Martin, 810 Main St.	Fort Worth
	Curby's Drug Store, 1407 Main St.	Fort Worth
	Dillin Bros., 300 S. Jennings St.	Fort Worth
	Evans Avenue Pharmacy, 915 Evans Ave.	Fort Worth
	Exchange Drug Store, 107 E. Exchange St.	Fort Worth
	Z. Gaither, 514 S. Main St.	Fort Worth
	George's Pharmacy, 1415 E. Front St.	Fort Worth
	Glenwood Pharmacy, 1421 Bessie St.	Fort Worth
	Grammar Pharmacy, 100 Main St.	Fort Worth
	Hickman & Clark, 1408 N. Main St.	Fort Worth
	Hightower & Harroll Drug Co., 1216 Peach St.,	Fort Worth
	Johnston Drug Co., 801 Houston St.	Fort Worth
	Jones Drug Company, 104 W. Exchange St.	Fort Worth
	Lackey's Pharmacy, 102 W. Front St.	Fort Worth
	R. T. Lee, 1230 Henderson St.	Fort Worth
	Jones Drug Store, 900 Evans St.	Fort Worth
	Lowes Drug Store, 11th & Jennings Sts.	Fort Worth
	Metropolitan, Main St.	Fort Worth
	Magnolia Drug Co., 1231 Hemphill St.	Fort Worth
	R. E. Martin, No. 1, 215 S. Main St.	Fort Worth
	Martin, No. 2, 2001 Vickery Blvd.	Fort Worth
	Model Pharmacy, 1101 College St.	Fort Worth
691	North Fort Worth Drug Co., 101 W. Exchange St.	Fort Worth

Nowlins Pharmacy, 400 N. Wheeler St.	Fort Worth
Owl Drug Company, 1312 N. Main St.	Fort Worth
Pangburns Drug Store, 501 Houston St.	Fort Worth
Pools Drug Store, 1200 First St.	Fort Worth
Puckett Drug Co., 1564 W. Magnolia St.	Fort Worth
Rafferty, F. L., 400 W. Bois d'Arc	Fort Worth
Rattan Pharmacy, 211 E. 15th St.	Fort Worth
Reeves Pharmacy, 12th & Jennings Sts.	Fort Worth
Renfroe Pharmacy, 11th & Main Sts.	Fort Worth
Renfroe Drug Company, 315 Main St.	Fort Worth
E. T. Renfroe & Co., 915 Houston St.	Fort Worth
Renfroe Drug Store, 715 Main St.	Fort Worth
Smythe Drug Co., 2407 N. Main St.	Fort Worth
F. J. Stangl Drug Co., 1300 Hemphill St.	Fort Worth
Temple Drug Company, 403 E. 9th St.	Fort Worth
10th Ward Drug Co., 2263 Hemphill St.	Fort Worth
Walkup Drug Co., 1610 Main St.	Fort Worth
M. D. Wallace, 321 N. Elm St.	Fort Worth
Webb's Drug Store, 200 Main St.	Fort Worth
Wilson's Drug Store, 1514-A Main St.	Fort Worth
Wofford-Powers Drug Co., 813-15 Houston St.	Fort Worth
Belknap Drug Co., 201 E. Belknap St.	Fort Worth
Hassell's Drug Co., 504 Main St.	Fort Worth
J. H. Boord, 1265 Evans St.	Fort Worth
Montcastle Drug Co., 1231 S. Main St.	Fort Worth
Transfer Drug Co., 1218 Houston St.	Fort Worth
Twentieth Ward, 200 N. Main St.	Fort Worth
Booth Bros., 807 Houston St.	Fort Worth
Duchich & Co., 609 Houston St.	Fort Worth
H. B. Jones Con. Co., 101 Main St.	Fort Worth
L. M. Mitchell & Co., 911 Main St.	Fort Worth
Royal Con. Co., 1012 Main St.	Fort Worth
Tupolis Confectionery Co., 1112 Main St.	Fort Worth
Lake Como, Lake Como St.	Fort Worth
Joseph Rocugno Confectionery, 1510 Main St.	Fort Worth
P. G. Chopmond, S. Jennings St.	Fort Worth
Kelly Bros., 128 Jennings St.	Fort Worth
Union Depot Fountain, Union Depot	Fort Worth
J. E. Brenner, 204 Main St.	Fort Worth
Club Confectionery, 1600 Back E. Front St.	Fort Worth
Palace Drug Store	Arlington
Rexall Drug Store	Arlington
Corner Drug Store	Arlington

692 The following proprietors or dispensers were interviewed and stated to the witness that Coke and Dope are used by the public as nicknames for Coca-Cola:

Ames, Mgr.	City Drug Store	Hattiesburg, Miss.
Jones, Prop.	Yellow Pine Drug Store	Hattiesburg
Fields, Prop.	Field's Drug Store	Hattiesburg
Edwardson, Prop.	Moore Grocery Store	Hattiesburg
Capdau, Prop. Flowers, Dispenser	Capdau Drug Co.	New Orleans, La.
A. A. Kaczovoski, Mgr. Evan Douch, Dispenser	Williams Pharmacy	New Orleans
F. E. Suter, Mgr.	Katz & Besthoff	New Orleans
W. L. Brown, Prop.	W. L. Brown Pharmacy	New Orleans

	Charles T. Peters	Peter Pharmacy	New Orleans
	Savaghier, Mgr.	Osenwald & Gross Drug Store	New Orleans
	F. S. Dean, Mgr.	Kirby Five Cent Store	New Orleans
	George F. Moss, Mgr.	Economical Drug Co.	New Orleans
	J. C. Capdenax, Prop.	Louisiana Candy Store	New Orleans
	A. B. Friel, Mgr.	Cusach's Drug Store	New Orleans
694	FredSchwartzenburg,Mgr	Katz & Besthoff	New Orleans
	Lopez Confectioner Co.		New Orleans
	P. O. Blane, Prop.	P. O. Blaine's Restaurant	New Orleans
	H. S. W. Code, Mgr.	Frank L. Simmons, Pharmacy	New Orleans
	William Rappold, Mgr.	Philadelphia Ice Cream Co.	New Orleans
	L. N. Power, Prop.	Power Drug Store	Bay St. Louis,Mis
	Chris. Gibbon, dispenser.		
	J. A. D'Aquin, Mgr. and Prop.	J. A. D'Quin Drug Co.	Biloxi
	J. Morris & Catshot, dispensers.		
	Dr. Rush, Prop.	Rush-Grayson Drug Co.	Biloxi
	Grant.	W. L. Grant Pharmacy	Biloxi
	Joseph L. Brenners, Disp.	Porter Pharmacy	Biloxi
	E. Berkley	Biloxi News stand	Biloxi
	Dr. McBay Young, Prop.	Scranton Pharmacy	Pascagoula
	Moore, Mgr.	Moore Grocery Store	Pascagoula
	A. E. Voyodzis, Prop.	A. E. Voyodzis	Pascagoula
	Mike Nomane, Prop.	Pascagoula Pool Room	Pascagoula
	John H. Hill, Prop	John H. Hill Confectionery Store	Moss Point
	Mr. Burnham	Burnham Pharmacy	Moss Point
	Dr. Sharp, Mgr.	Southern Paper Co.	Moss Point
	J. W. Culver, Mgr.	Parlor's Drug Store	Gulf Port
	J. O. Baker and Lewis Mossino, dispensers		
	Mr. Day, Prop.	Day Drug Co.	Gulf Port
	Dr. H. H. Jones, Mgr.	Jones Bros. Drug Store	Gulf Port
695	George Lambraisev's Soda Fountain		Gulf Port
	Lewis Stratakos	Lewis Stratakos	Gulf Port
	W. K. Porter	The Imperial Palm Parlor	Gulf Port
	Dr. T. P. McInnis, Prop.	City Drug Store	Lumberton
	C. Polato	Grocery Store	Lumberton
	Dr. Fred W. Smith, Mgr.	Poplarville Drug Store	Poplarville
	Miss Kate Collins, Prop.	Collins' Restaurant	Poplarville
	Mrs. C. W. Cleghorn, dispenser.		
	J. W. Bradshaw	Grocery Store	Poplarville
	Columbia Drug Store		Columbia
	Barry Drug Co.		Columbia
	Dr. Harris, Mgr.	Barry Bros. Drug Store	Columbia
	Dr. Ratcliff Faraberry, dispenser.		
	Dr. G. H. Wells, Prop.	Walker Bros. Drug Store	Columbia
	O. S. Mayfield, Prop.	Collins Drug Store	Collins
	Dr. Stovall, Prop.	Stovall Drug Co.	Collins
	Mr. Jones	Jones Beacham Restaurant	Collins
	Mr. Scott	Scott's Restaurant	Hattiesburg
	Mr. Hyde	M. W. Hyde Drug Co.	Ellisville
	Dr. Ward	E. J. Ward's Pharmacy	Ellisville
	Sam Imbragnglic	Sam Imbragnglic	Ellisville
	Mr. Abbey	C. A. Abbey & Son	Ellisville
	City Drug Store,		Laurel
	G. W. Nicholson	Hattiesburg Drug Co.	Laurel
	W. S. Ames, Mgr.	Century Drug Store	Laurel
	W. H. Hill, dispenser.		

Mr. Scruggs	Scrugg's drug store	Laurel
Mr. Wallace	T. J. Wallace Drug Co.	Laurel
L. Banker, Mgr.	Pastime Pool Room	Ellisville
J. B. Waldrop, Mgr.	Waldrop's Pharmacy	Meridian
C. W. Harper, C. V. Cooley and Roy Ray, dispensers		
Mr. Renfroe, Prop.	Renfroe Pharmacy	Meridian
J. C. Ware	Ware & Kendall's Pharmacy.	Meridian
C. J. Woodruff, Prop.	C. J. Woodruff, Drug Co.	Meridian
Mr. McCorkle, Prop.	McCorkle Drug Co.	Meridian
Mr. Heiss, Mgr.	Paragon Pharmacy	Meridian
E. P. Simmon, dispenser		
Dr. Coleman	Coleman's Pharmacy	Meridian
V. Knapp, Mgr.	Sugerman's Cigar Store	Meridian
Manager	C. Camarinos	Sherman, Texas
Mr. Plea	Palace of Sweets	Sherman
Mr. Noll, Prop.	Carl R. Noll Drug Co.	Sherman
Mr. Stinson	Craycroft & Stinson	Sherman
Manager	Langford & Keith's Drug Store	Sherman
Mr. Watson	Watson's	Sherman
Dr. Turner	Turner's Pharmacy	Sherman
W. L. Bidding Drug Co.		Sherman
Manager	People's Pharmacy	Dennison
Mr. Kingston	Kingston Drug Co.	Dennison
Dispenser	Frank Maniolos	Dennison
Mr. Ramsey, Mgr.	Reynolds Drug Co.	Dennison
Mr. Cross	Cross' Drug Co.	Dennison
Tony Giarraputo	Tony's Palm Garden	Dennison
S. G. Davis, Prop.	Tango	Van Alstyne
Mr. Brown	Brown-Baker Drug Store	Van Alstyne
J. J. Pitts, Prop.	J. J. Pitts Soda Fountain	Van Alstyne
Oliver G. During	City Drug Store	Van Alstyne
Mr. Hughes, Prop.	Hughes Restaurant	Van Alstyne
Messrs. Coffee, Props.	Alcove Confectionery	McKinney
C. Camarinos, Prop.	Olympia Confectionery Store	McKinney
Mr. Mitchell, Prop.	Mitchell Drug Store	McKinney
Major Smith	Smith's Drug Store	McKinney
Dr. Hanner	Hanner Drug Co.	Dennison
C. H. Hughes	Dearmore & Hughes	Van Alstyne
Mr. Schrodt, Prop.	Schrodt's Pharmacy	Dallas
E. L. Day, dispenser.		
C. R. Smith	C. R. Smith's Pharmacy	Dallas
L. E. Kerr, Mgr.	Empire Drug Co.	Dallas
Mr. Nossett, B. W. Fuller dispensers.	Palace Drug Store	Dallas
R. C. Coppedge, Prop.	Oriental Drug Store	Dallas
T. J. Britton, Prop.	T. J. Britton's Pharmacy	Dallas
Jeff Britton, dispenser.		
B. H. Anderson	Tyler Avenue Pharmacy	Dallas
Mallory Drug Store		Dallas
Lewis Davis, Prop.	Davis Confectionery Store	Dallas
Mr. Littlepage	Bishop Avenue Pharmacy	Dallas
Harris and Clark, Props.	Crystal Pharmacy	Dallas
R. H. White, Mgr.	Titche & Goettinger	Dallas
I. C. Guy	Haskell Pharmacy	Dallas
Marshall	Blain Marshall Drug Store	Dallas
Manager	Washington Avenue Phar.	Dallas
Blackeney	Kirby & Blakeney	Dallas

	Mrs. E. C. Flagg	Flagg Floral & Confectionery Store	Dallas
698	B. C. Camp, Prop.	North Dallas Drug Co.	Dallas
	W. N. Craig	Fairmount Pharmacy	Dallas
	L. O. Donnelly, Mgr.	Oak Cliff Pharmacy	Dallas
	B. B. Brown, Clk. W. H. Gault, dispenser	Gallett & Compton's Drug Store	Dallas
	F. L. Johnson, Mgr. Ernest Dowdy, dispenser	McKinney Avenue Drug Store	Dallas
	T. H. Littlepage, Prop.	Littlepage Pharmacy	Dallas
	W. B. Dougherty, Prop.	Highland Park Pharmacy	Dallas
	J. A. Duncan Dispenser	Magnolia Pharmacy New York Ice Cream Parlor	Dallas Dallas
	Mr. Gilliland, Prop.	Gilliland Pharmacy	Dallas
	W. T. Coble, Prop.	Oak Lawn Market & Bakery	Dallas
	Mills, Mgr.	Thomas' Confectionery Store	Dallas
	J. E. Blackwell, Mgr. S. H. Browning and C. A. Reeves, dispensers	Farrow-Linder Pharmacy	Dallas
	S. H. Alhoff, Prop. H. D. Harding, dispenser	Owl Drug Store	Dallas
	Mr. & Mrs. Harper	Harper Confectionery Store	Grand Prairie
	Mr. Butcher	City Drug Store	Grand Prairie
	Johnson, Prop. Mr. Sykes, Mgr.	Cooper Drug Store	Grand Prairie
	Harry Harris, Prop. R. C. Johnson, dispenser	Harry Harris Drug Co.	Cleburne
	M. S. Ball, Mgr. G. C. Dorris and W. I[illegible]alton, dispensers	Foster & Fain's Drug Store #2	Cleburne
699	C. F. Humphreys, Prop. J. M. Williams, dispenser	C. F. Humphreys	Cleburne
	E. J. Campsey	E. J. Campsey Drug Store	Cleburne
	W. B. Featherstone, Jr., A. C. Featherstone		
	E. C. Reeves and William Binder, dispensers #1	Foster & Fain's Drug Store	Cleburne
	F. B. Guard, dispenser	G. E. Mecham	Cleburne
	R. P. Cyrus	Cyrus & Cyrus	Cleburne
	Dr. C. R. Walker	Crow & Walker's Drug Store	Cleburne
	C. D. Williams	Palace Drug Store	Arlington
	Jim Rose	Corner Drug Store	Arlington

At the fountains at the following places, during the time specified, in the presence of the witness, every person using the word Coke or Dope in ordering was asked by the dispenser what he meant and in each instance the answer was Coca-Cola. The first column gives the page of the record. The second the town, the third the name of the store, the fourth the time during which the test was made, the fifth the number of calls for Coca-Cola, the sixth the number of calls for Coke, the seventh the number of calls for Dope.

				CC	C	D
New Orleans, La.	Capdau Drug Co.	8 a. m. to 10 p. m.	113	3	8
New Orleans, La.	W. L. Brown Co.	all day	38	7	8
New Orleans, La.	Peters Pharmacy	9 a. m. to 7 p. m.	21		3
Bay St. Louis, Miss.	Power Drug Store	all day	38		18
Biloxi, Miss.	J. A. D'Aquin Drug Co.	all day	19	6	28
Gulf Port, Miss.	Parlor's Drug Store	8.30-8 p. m.	35	1	101
Columbia, Miss.	Barry Bros. Drug Store	4.40 p. m. 9.30 p. m.	11		23
Laurel, Miss.	Century Drug Store	8.20 a. m. 12 m.	24		33
Laurel, Miss.	Scrugg's Drug Store	2 hrs.	11		9
Meridian, Miss.	Waldrop's Pharmacy	8 a. m.-7.30 p. m.	105		215
Sherman, Texas	Carl R. Noll		7	36	
Dennison, Texas	C. D. Kingston's Drug Store	2.30 p. m. 8 p. m.	11	41	
Dallas, Texas	Oriental Drug Co.	10 a. m.-5 p. m.	9	47	
Dallas, Texas	Palace Drug Store	7p. m.-10 p. m.	5	14	
Dallas, Texas	Schrolt's Drug Store	7.25 a. m.-8.30 a. m.	5	9	1
Dallas, Texas	Britton's Phar.	8.45-11.15 a. m.	14	28	3
Dallas, Texas	Thomas' Confectionery Store	8.15 a. m.-12 m.	22	40	
Dallas, Texas	Olympia Confectionery Store	1.15-5.50 p. m.	22	47	
Dallas, Texas	Farrow-Linder Phar.	7.10 to 10.25 p. m.	9	9	
Dallas, Texas	Owl Drug Store	7.30 to 11.35 a. m.	9	28	

T. M. MURPHY (Rec., 498):

Towns visited: Summerset, Ky., Lexington, Ky., Louisville, Ky., Bowling Green, Ky., Owensboro, Ky., Helena, Ark., Little Rock, Ark., Texarkana, Ark., Camden, Ark., Pine Bluff, Ark., Brinkley, Ark., Newport, Ark., Walnut Ridge, Ark., and Pocahontas, Ark., Poplar Bluff, Mo., Sykeston, Mo., and Cape Girardeau, Mo.

At the following places, the witness on separate occasions, called for Coca-Cola, Coke and Dope. In every case the syrup was drawn from the same container.

Town	Store
Summerset, Ky.	Kelsey Drug Co.
Summerset	Palace of Sweets
Lexington	C. A. Johns Drug Store
Lexington	Smith's Drug Store
Lexington	Jones Drug Co.
Lexington	McAdams & Morford, Druggists
Lexington	Thompson Drug Co.

	Lexington	Lexington Drug Co.
	Lexington	William Stagg, Druggist
	Louisville	Burmyers Brothers
	Louisville	Southern Catering Co.
	Louisville	T. P. Taylor & Co.
	Louisville	Newman Drug Co.
	Louisville	J. B. Baird, Druggist
	Louisville	H. O. Hurley, Druggist
	Louisville	Kline & Sons, Confectionery
	Bowling Green	Callis Brothers
	Bowling Green	J. E. Tyler
500	Owensboro	Weldon Drug Co.
	Owensboro	Public Drug Co.
	Owensboro	Readman's Pharmacy
	Helena, Ark.	Myers Drug Co.
	Helena	Palace Drug Co.
	Helena	Govan-King Drug Co.
	Little Rock	Snodgrass-Bray Drug Co.
	Little Rock	Read-Stahel Drug Co.
	Little Rock	State Drug Store
	Little Rock	Pittman Drug Co.
	Little Rock	Perins Drug Co.
	Texarkana	Evanson Drug Co.
	Texarkana	Boyd Drug Co.
	Camden	Arthur Levy, Druggist
	Camden	Morgan Drug Co.
	Pine Bluff	Seal's Pharmacy
	Pine Bluff	Rosenburg's Pharmacy
	Pine Bluff	Bedell's Pharmacy
	Brinkley	Dutton Drug Co.
	Brinkley	W. K. Sims Drug Co.
	Newport	Bevans Drug Co.
	Newport	Walker Drug Co.
	Walnut Ridge	Moses Cooper's Place
	Walnut Ridge	Bob Cooper's
	Pocahontas	Brinkley Drug Co.
	Pocahontas	Layman Drug Co.
	Pocahontas	Palace Drug Co.
	Poplar Bluff, Mo.	Patton & Farr Pharmacy
	Poplar Bluff	Gliddens Candy Kitchen
	Sykeston, Mo.	J. A. Poindexter
	Sykeston	Derris Drug Store
	Cape Girardeau	St. Charles Pharmacy
	Cape Girardeau	Dalton Drug Co.
	Cape Girardeau	A. B. Miller's Confectionery & Drug Co.

Witness then interviewed the proprietor or dispenser at each of the above listed places who stated that Coke and Dope meant Coca-Cola.

This witness' testimony can be summarized as follows:

Number of towns visited, 77; number of proprietors, managers and dispensers interviewed, 102; number of consumers' tests made, 26.

In these consumers' tests there were 519 calls for Coca-Cola, 98 calls for Dope and 302 calls for Coke. In every instance the syrup to make the drinks called for, as Coca-Cola, Coke and Dope was taken from one and the same container.

Each consumer who used the words "Coke" or "Dope," was by the dispenser, in the presence and hearing of the witness, asked what he meant, the reply invariably was Coca-Cola.

SCHEDULE III.

That the red color of the Coca-Cola barrel is distinctive and a means by which Coca-Cola is identified is clear from the testimony. The following are extracts from the record which establish this fact:

F. L. SKILLEN (Rec., 792), druggist, Dallas, Texas:

794 "We took over the Browder Pharmacy from the U. S. Court. Yes, sir; we found among the assets what we supposed was 'Coca-Cola.' There was a barrel which we supposed was 'Coca-Cola' and I inquired of the soda man if he had any 'Coca-Cola' on hand and he said, yes, about ten or fifteen gallons. I passed in the back room and saw a red barrel sitting there and passed on out and we served all of that. Yes, sir; we served it as 'Coca-Cola.' You ask what made me think it was 'Coca-Cola'; why, I suppose it was innocence more than anything else, we don't serve anything else but 'Coca-Cola' and didn't suppose anybody else did. I asked him did he have any 'Coca-Cola' on hand and he said yes. You ask if the color had anything to do with it; yes, it was red and I supposed it was 'Coca-Cola.' You again ask if the color of the barrel had anything to do with it; yes, the color was the 'Coca-Cola' color. When that was sold and we ordered a barrel of 'Coca-Cola' delivered to us to the store the salesman from the jobbers said they hadn't been handling 'Coca-Cola' over there and then I told him it must not have been 'Coca-
795 Cola' that we had and then I asked the soda man about it and he said it was not; and we had an employee at that time, who had formerly been with Mr. Browder, by the name of Mr. Sam Weir, and I asked Sam if that was 'Coca-Cola' and he said, 'No. * * * I took over that store April 11th, I believe, 1912. The conclusion that we arrived at was that it was a store that had been selling 'Koke.' * * * You ask if I

got any complaints from the drinkers at the fountain that it was not 'Coca-Cola'; it is so far back that if there had been any complaints I wouldn't have known anything about it, but I sold it laboring under the impression that it was 'Coca-Cola.' * * * I couldn't say how it differed from the 'Coca-Cola' barrel. I never saw the barrel but once and I just glanced at it. Yes, sir; I have seen other 'Coca-Cola' barrels and I didn't notice any distinction between this barrel and other 'Coca-Cola' barrels, it was painted red."

GEORGE ALFRED HARBOUR (Rec., 456), Atlanta, Georgia, proprietor of Harbour's Smoke House; has been conducting a soda fountain five years and a half:

"'Coca-Cola' kegs have an individuality about them that is easily distinguishable from any other drink, anything that I have ever bought, and when I see them setting out there on the street I know it is a 'Coca-Cola' keg."

I. L. JAMES (Rec., 460), Atlanta, Georgia; drug business:

"No, if I should order 'Coca-Cola' and a white barrel should be shipped to my place I would not think it was 'Coca-Cola.'"

ALEXANDER CRUICKSHANK (Rec., 463), Atlanta, Ga.; cigars and soda water, five stores:

"I can mighty near tell a 'Coca-Cola' keg when I see it. I can sight one on the wagon; I know it is 'Coca-Cola.' The thing about a 'Coca-Cola' keg that indicates to me that it is a 'Coca-Cola' keg, is the color of the keg."

DAVID G. WISE (Rec., 474), Atlanta, Ga., for five years; keeps two retail stores:

475 "If I were to order 'Coca-Cola' and it came to me in a barrel painted white instead of red my porter would likely call my attention to it and say 'Doctor, this ain't right, something wrong about this.'"

CECIL V. ROGERS (Rec., 735), druggist, Dallas, Texas; has been in drug business for about twenty-three or twenty-four years:

738 "If I were walking down the street and saw in front of a store where there was a soda fountain, a pile of red barrels and assuming that I was far enough off so that I could not see the labels, I would decide it was a 'Coca-Cola' barrel. I am familiar with the color; I have handled quite a number in my time and I have always received it in red barrels and I have never seen it in any other colored barrel."

J. B. PENDERGRAST (Rec., 496), druggist, Atlanta, Ga., testified:

497 "If I saw a cartload of kegs going down the street, some red and some white, I would naturally think of 'Coca-Cola' being a red keg."

W. A. HARTMAN (Rec., 492), 173 Ashby street, Atlanta, Ga.; cigar and soda water business:

"You ask how I could distinguish a keg of 'Coca-Cola' by its appearance; I could distinguish it by the color of it. No, sir, I have never seen it in anything else except red kegs or barrels. If I should see a line of red kegs or barrels in front of a soda fountain what would flash immediately in my mind would be that they are 'Coca-Cola' kegs."

CHARLES KINGSBERRY (Rec., 465), Atlanta, Ga.; cigar and soda water business:

"Q. 23. You know it when you see it by the color it has? A. By the color; yes, sir. Q. 24. That is one of the ways? A. Yes, sir, that is one of the ways that I know it, and the name, another way. If I should see in front of a soda water stand a whole lot of barrels and kegs of red color, the first thing that would flash through my mind would be that it was 'Coca-Cola.' Yes, sir; that would be so whether I saw the label or not, because they have been putting it out in red kegs ever since I have been getting it from them."

R. K. SMITH (Rec., 1190) first soda clerk with the United Cigar Stores Co., Nashville, Tenn., a witness called by the Koke Companies, admitted:

"I could tell a Coca-Cola barrel if it was labeled Coca-Cola. If it was not labeled possibly I would think it was a Coca-Cola barrel because they are red barrels."

The following is a tabulation of other testimony which shows that the color of the Coca-Cola barrels is a distinctive red, and that this color aids purchasers and consumers in ascertaining that a barrel does or does not contain Coca-Cola. One of the steps of infringement by the respondents is the imitation of these distinctive barrels. That respondents paint their barrels in exact imitation of the Coca-Cola barrels, and buy used Coca-Cola barrels is admitted.

	Record Page.
S. C. Dobbs	319, 320 & 321
F. M. Robinson	357
C. H. Candler	395, 396
I. V. Wood	569
M. D. Palmer (Paint for Koke Co.)	577, 578
D. P. English	802
Frank P. Killilea	678,679
W. J. Cheevers	588 *et seq.*
Nick D. Chotas	448
F. W. Green	451
I. L. James	460
F. F. Langenfeldt	473
J. F. Redding	479
W. A. Medlock	483
Clyde Park	513
See, also, the stipulation entered into in this case concerning the testimony of:	
C. Stanley French	856, 857
Edward T. Longstreth	856, 857

SCHEDULE IV.

The record shows that Coca-Cola has been the same color since it was first manufactured. That this color is produced by the use of caramel, or burnt sugar. The amount of caramel used in Coca-Cola is minute and its use is not structural, but for a decorative and identifying purpose. That is to say, that it does not produce any part of the flavor of the product, but is used to give it the color that the product has.

It was further shown by a number of witnesses that color is one of the methods of ascertaining and determining from observation if a product is Coca-Cola or not.

The following witnesses so testified:

Name of Witness.	Record Page.
S. C. Dobbs	319, 320
C. H. Candler	395
W. P. Heath	415, 417
Nick D. Chotas	448
F. W. Green	451
Charles Kingsberry	467
Charles E. Caspari	901

It is clear from the record that Coca-Cola as a beverage is identified by its distinctive color and taste.

I. L. JAMES (Rec., 460), Atlanta, Ga., drug business:

"No, if I should order a 'Coca-Cola' at a soda fountain and they should give me a yellow drink I would not think it was 'Coca-Cola.' "

GEORGE ALFRED HARBOUR (Rec., 456), Atlanta, Georgia, proprietor of Harbour's Smoke House; has conducted a soda fountain five years and a half:

"No, sir, I cannot serve to my customers asking

for 'Coca-Cola,' either by its name, or by any of its nicknames, a golden yellow beverage because they would know it was not 'Coca-Cola' by its color."

It is admitted by the testimony of a number of witnesses produced by the respondents that caramel in a product of this character is used purely for coloring; that it is not an essential part of the product, and even if caramel is used there is no necessity for the exact duplication of the shade of Coca-Cola; that different quantities of caramel give different colors, and that by the use of different quantities any shade from a pale straw color to practically a black can be obtained. Upon this admitted fact is based the argument of the Coca-Cola Company that the exact duplication of Coca-Cola in color of the Koke Companies' product is unnecessary. 559

R. K. SMITH (Rec., 1190) (a witness called by the respondents), first soda clerk, with United Cigar Stores Co., Nashville, Tenn., testified:

"The color depends upon the amount of caramel you use. You can make a different drink, take a white drink and add caramel coloring and you can get anywhere from a pale yellow to a black." 560

J. D. Fletcher, a manufacturer (Rec., 1091, 1094), testified that he uses caramel simply for coloring.

J. A. Bermudez (Rec., 1498) testified that caramel gives body and appearance. By using different amounts of caramel, different shades can be obtained; that Koke, with or without caramel, would not be changed in taste; that the purpose of using caramel is to give color.

SCHEDULE V.

Respondents' salesmen in attempting to sell their product hold out as an inducement to purchase that more money can be made in its sale than in the sale of Coca-Cola and that it can be sold as and for Coca-Cola and the public cannot tell the difference. The testimony establishes beyond controversy that these representations are deliberately, continually and systematically made.

ROBERT CHIDSEY (Rec., 558), manager of the Etowah Company Soda Water and Ice Cream Parlor, 250 Dauphin street, Mobile, testified that he had a call from a representative of The Southern Koke Company, Limited:

559 "He proposed to sell me his syrup called 'Koke,' which he claimed was a good substitute for 'Coca-Cola' and that it could be sold for 'Coca-Cola,' and I stated to him that I didn't care to purchase this syrup to sell in place of 'Coca-Cola' and he thereupon figured up the difference in profit between 'Coca-Cola' and his stuff. Under his way of figuring it, his syrup cost me about fifty cents a gallon less than 'Coca-Cola.' * * * He sent me some stuff
560 and told me I could serve it in the place of 'Coca-Cola.' * * * I didn't know him before he called on me, and, without any preliminary knowledge of me or I of him, he opened the proposition for me to commit a fraud on the public by substituting his goods for 'Coca-Cola'—that's my testimony. You ask if that wouldn't have been an arrant fraud; well, he told me I was a little too conscientious about the matter. * * * He said I could sell 'Koke' in the place of 'Coca-Cola' and make more money out of it. He said I would get the same price for it as I did for 'Coca-Cola,' but argued that if a man came along and called for 'Coca-Cola' I could serve him that,

which would net me a greater profit than if I gave him genuine 'Coca-Cola.' Yes, sir; I still insist that
561 his only object in seeing me was to induce me to buy his syrup and sell to my customers instead of 'Coca-Cola.' * * * The reason why he sent me a gallon afterwards was because he told me I could try it and taste it and if I didn't think it was as good as 'Coca-Cola,' and it couldn't be served as 'Coca-Cola,' that I needn't bother about it any further."

E. R. ALBRIGHT, of Albright & Wood, druggists of Mobile, Ala., testified (Rec., 546):

546 That Patton, the representative of the Southern Koke Company, Ltd., called on him in November, 1913. Patton stated that the Southern Koke Company had the names "Dope" and "Koke" copyrighted; when people asked for "Dope," give them "Dope"; when they asked for "Koke," give them "Koke." "'Dope' and 'Koke' were the same." Patton stated that it was unfair competition to sell "Coca-Cola" in response to requests for "Koke" and "Dope," and that dealers who served "Coca-Cola" for "Dope" would be liable for prosecution by the company Patton represented. The fact that "Koke" and "Dope" were nicknames for "Coca-Cola" was discussed. Albright stated that he always furnished "Coca-Cola" when people asked for "Dope." Speaking of Patton he said, "His argu-
547 ment was that they had the names 'Dope' and 'Koke' copyrighted, and that a dealer who supplied 'Coca-Cola' for those articles when they asked for 'Dope' and 'Koke' would be liable to prosecution, that they owned that name the same as the Coca-Cola people did 'Coca-Cola.'"

Albright and Wood bought two barrels of the product of the Southern Koke Company, Ltd., stipulating that it should be shipped unlabeled. The price was less than the price of "Coca-Cola." Thereafter, when people asked for a "Koke" or a "Dope," at Albright & Wood's fountain they were given the product of the Southern Koke Company. Albright testified:

"Why, I should say I have known the nicknames 'koke' and 'dope' to be applied to 'Coca-Cola' about eight years,—eight or ten years."

Albright & Wood did not want the Southern Koke Companys merchandise to be labeled.

"I didn't care for my customers to know that I was using the stuff at all."

He justified its sale in response to orders for "Koke" and "Dope" as follows:

"I didn't feel like I was violating any law, because I didn't serve it as 'Coca-Cola,' I served it as 'Dope.'"

He discontinued because:

548 "It was my own feeling in the matter. I didn't think I was doing right. I know that I drink 'Coca-Cola' and have for years, and did before I went in business on my own account, and when I went into a place and asked for 'Dope' I expected 'Coca-Cola.'

* * * * * *

550 RDQ. 1. Mr. Albright, you said a few minutes ago, in answer to a cross-question that you didn't serve this product of the Koke Company of America for 'Coca-Cola,' the fact is, isn't it, that you didn't serve it to people who used the word 'Coca-Cola' in making their request? A. Exactly; yes, sir.

RDQ. 2. You did, however, serve it to people who used the words 'Koke' and 'Dope'? A. Yes, sir."

I. V. Wood (Rec., 566), of the firm of Albright & Wood, druggists, of Mobile, testified that he had a conversation with a representative of the Southern Koke Company who tried to get him to purchase some of the product of the respondent:

567 "He claimed that 'Koke' and 'Dope'—that they had the copyright name for it, and that it was their product, and if a man came in and asked for 'Koke' or 'Dope,' why we had a right to sell their product, that they had a registered name for it, that was my
567 impression, that they sold it under. I bought one barrel of their product, I think, which was delivered. I think the barrel in which it came,—I don't know exactly, but I believe the barrel was kind of a dark red, or maroon color. It was very much like the 'Coca-Cola' barrel in one respect,—across the heading of it was a little bit different, not exactly like 'Coca-Cola.' No, sir; it did not have a label on it. Yes, sir, I requested it to be shipped without the
568 label. It came from New Orleans, La., by freight, and was delivered to my store here in Mobile. The representative of the Koke Company didn't ask me to come out and substitute this product for 'Coca-Cola,' but he said in the conversation I had with him,—he said, 'When they ask for "Koke" or "Dope," why it means that our product is to be sold because we have a registered name. We are sole owners of the name "Koke" and "Dope," and you have a perfect right to serve them and serve our product; and when people ask for "Coca-Cola" to give them "Coca-Cola." ' They didn't insist on me serving 'Coca-Cola' when they asked for 'Dope,' but they said for me to use two cans, one for 'Koke' and one for 'Coca-Cola' and I bought under these conditions—that I use one for 'Coca-Cola' and one for 'Dope' when they asked for it. No, sir, I don't believe I had ever heard of any product except 'Coca-Cola' up to that time under the name of 'Koke' or

'Dope.' Q. 41. Then the fact that the Southern Koke Company was making a product which they were designating as 'Dope' and 'Koke,' was a surprise to
569 you, wasn't it? A. Yes, sir. * * * I said something to this agent at the time to the effect that I recognized 'koke' and 'dope' as nicknames for 'Coca-Cola.' Well, he told me to serve it under the name 'Koke' and if people asked for 'Koke' serve it—serve 'Koke.' He said I had a right to serve their product because they had a registered name which was a registration of 'Koke.' Q. 47. Anything said about 'Dope' in that connection? A. 'Dope,' too, 'Koke' and 'Dope.' You ask if anything was said about the product being like 'Coca-Cola,' by the agent; well, I think so, I believe it was supposed to be the same thing.

* * * * * *

574 One of the representatives, I don't know which one, told me a man serving 'Coca-Cola' under the name of 'Dope' or 'Koke' would violate the law because they owned the copyright name for 'Dope' and 'Koke' and a man really ought to serve it when they
575 call for that, because they own it and nobody else. * * * When we were handling this product of the Koke Company of America and had it in a separate container in the fountain and a man came and asked for 'Dope' or 'Koke' I gave him the product 'Koke' or 'Dope'—the product of the Southern Koke Company, Ltd., yes, sir. Well, we had that barrel because I was under the impression that they were the sole owners of the copyright name 'Koke' and 'Dope.' RDQ. 10. You thought you were compelled to do that? A. Yes, sir. You ask if I felt that I might be sued if I didn't handle it; well, I will tell you, I didn't like to be a substituter and I thought I was doing my duty to do it. Yes, sir; I got that idea from the statement made to me by this representative of the Southern Koke Company. Yes, sir; that I would be a substituter if I didn't sell the product of the Southern Koke Company when people asked

for 'Koke' or 'Dope.' You ask what I understood the purchaser meant when he asked for 'koke' or 'dope'; naturally, as I stated before, if a man asked for 'koke' or 'dope' I was under the impression all the time that he wanted 'Coca-Cola.' I knew that he wanted 'Coca-Cola' because 'dope' and 'koke' had been common names since I had been knowing it—nicknames for 'Coca-Cola' before I ever heard of any substitute or any other preparation with a similar name; ever since 'Coca-Cola' was put on the market, and I took it for granted that was what they wanted."

DAVE S. BAUER (Rec., 533), retail druggist in Mobile, Alabama, for twenty-odd years. During that time has handled and dispensed Coca-Cola. Had an interview in the latter part of the year 1913 or the fore part of the year 1914 with two men representing the Southern Koke Company of New Orleans:

534 "One introduced himself as the representative of the Southern Koke and Dope Company and said he had a soda fountain beverage that he thought would interest me. I just referred him to my head soda water man and he said he wanted to talk to me about it; said he had a cola drink that he could replace
535 'Coca-Cola,' that we could serve at the fountain and save money on the 'Coca-Cola,' and the public or no one could tell the difference, and save at least fifty cents a gallon on it. When I informed him that I didn't use any substitutes for 'Coca-Cola' he told me that they had a copyright on their stuff 'Koke' and 'Dope,' and that when the trade called for it that way I was expected to serve that, otherwise I would be subject to prosecution. He said that he had a copyright on the names 'Koke' and 'Dope' and argued that if people called for a beverage at a soda fountain under the name 'Koke' or 'Dope' that is

what we would have to serve, but if we served any other cola drinks in that place we would be subject to prosecution. * * * You ask me to state if this representative of the Southern Koke Company about whom I have testified, and who had this conversation with me, said anything about the possibility of selling his product on calls for 'Coca-Cola'; in reference to that, he told me that if I wanted to serve 'Coca-Cola' at my soda fountain, and serve 'Koke' and 'Dope,' that it would be necessary for me to have two casks, to keep out of trouble; that if I served 'Koke' and 'Dope'—at least if I served 'Coca-Cola' when 'Koke'
536 and 'Dope' was called for—I was serving something the customers didn't ask for and was liable to prosecution; that they had the copyright under that name. You ask if anything was said about substituting 'Koke' for 'Coca-Cola'; that was one of the first things that he told me, that I could serve 'Koke' and 'Dope,' and that the calls for 'Coca-Cola' the public wouldn't know it and couldn't tell the difference. * * * You ask if anything was said about the product he was selling which he denominated 'Koke' and 'Dope' being cheaper than 'Coca-Cola'; if anything was said to me about my being able to make more money in the sale of his products than I would in the sale of 'Coca-Cola,' and if that was held out as an argument for me to purchase; to all of these questions I answer—yes, sir. Well, that is pretty much what he said, I think, after first trying to induce me to buy his syrup, as I understood it, as a substitute for 'Coca-Cola,' and after I informed him that I never sold a substitute for 'Coca-Cola' and never expected to, he then told me, 'Maybe you don't know it, but our syrup is copyrighted. You have more calls for this drink in our name than you do under the name of "Coca-Cola." Now, if you serve "Coca-Cola" when our drink is called for, why, you are subject to prosecution'; and I said, 'Well, I am going to see that they do not serve it.' He says, 'How are you going to do that?' Then I showed him a sign

we had on the fountain that said, 'If you want "Coca-
537 Cola," please call for it by its correct name; that is the only cola drink we serve at this fountain.' Then, in addition to that, that when a customer calls for 'Coca-Cola'—that is, when they call for 'koke' or 'dope'—to tell them they want 'Coca-Cola,' and, if they raise any question to our question of their intelligence, we would simply show them the card and let them know there are two different drinks. Well, he said, 'You are busy and I will see you later,' and that was the end of the conversation with him. Previous to that time I had given instructions to my soda dispensers to make the inquiry of purchasers who asked for 'koke' and 'dope' if they wanted 'Coca-Cola.' When they say, 'Give me just what we ask for,' we say, 'Well, we don't carry anything but "Coca-Cola." ' In a good many instances they state, 'Look here, I didn't come in here to be jollied, I came in here to get what I want.' The dispensers would then say, 'We just don't serve anything else but "Coca-Cola," ' and this card would be shown to the purchaser, and in a majority of cases the fellows would just tell what they wanted. The card referred to is the one marked 'Plaintiff's Exhibit No. 100.' Of course, I watched this pretty close to see what effect it would have on my business, and visited my soda fountain more often than usual, and, whenever I seen that card shown them, without one exception I heard the reply, 'Say, I want "Coca-Cola." I didn't know there was two drinks, I didn't know there was another one like that.' "

GEORGE L. SEIBERT (Rec., 551), Bauer's dispenser, testified:

That he exhibited the "Koke" card, identified by Bauer, to the customers who used the word "Koke" or "Dope" at the soda fountain.

"When people come in and asked for 'dope' before I got this card I would give them 'Coca-Cola,'

and when we got the card down there Mr. Bauer told us what to do and say—we handed it out to them and they would say, 'You know what I want—"Coca-Cola"'—and it made a few of them mad, you know."

G. H. UPCHURCH (Rec., 521), drug business, Mobile, Alabama, testified:

523 "I remember a call I had from a representative of the Southern Koke Company of New Orleans about February 20, 1914. This representative did not talk to me personally; he talked to one of the men at the fount named John Graham. * * * He began to make a statement—a question, rather, of Mr. Graham at the fount, what they were serving when they had calls for 'dope' or 'koke.' Mr. Graham replied to him, saying that they were serving 'Coca-Cola.' This agent then informed Mr. Graham that they had no right to do it—that they had a patent or trade-mark on the words 'Koke' and 'Dope'
524 and that they had the exclusive use of it and that we had no right to serve 'Coca-Cola' when 'Dope' and 'Koke' were called for. That was the substance of the conversation."

J. W. GRAHAM (Rec., 555):

Employed at Bienville Pharmacy in Mobile, Alabama. Came there on the 15th of February, 1914. About the last of February had a conversation with a representative of the Southern Koke Company, Limited. He testified concerning that interview:

555 "Some one came in and asked for 'koke' and I served him with 'Coca-Cola' and this gentleman walked up—he asked to see the boss—the boss was busy right then, but I told him he could see him in a
556 few minutes. He asked me if I had many calls for 'koke' or 'dope,' and I told him, yes. He asked me did I serve 'Coca-Cola,' I told him yes. He asked me

again did I think that they meant 'Coca-Cola' when they asked for 'koke.' I told him, yes, because I asked them what they meant and they told me what they meant, therefore I served them 'Coca-Cola.' He said, 'Why not have a "koke"? You can get it a whole lot cheaper than you can "Coca-Cola."' I told him I didn't know anything about that; I didn't know the price of 'Koke.' He said he was selling it and wanted to see the boss. I don't know whether he ever saw him or not; I went to dinner. Anyway, we talked quite a little bit on it and I said that a man who asked for 'koke' and 'dope' or 'shot,' meant 'Coca-Cola,' simply because when I first went behind the fountain I was an inexperienced man and didn't know what they meant and they said 'Coca-Cola,' of course. When I got experience, a man came in, asked for 'koke' nine out of ten he wants 'Coca-Cola'—you ask him and he tells you what he wants. I made this statement to this man, who said he was the representative of the Southern Koke Company. We got into an argument and he said that when a man came in and asked for 'koke' that I could serve him 'Koke' and he would be getting what he asked for; that is, I could sell him the product of the Southern Koke Company, Ltd. I said, 'No, he means "Coca-Cola."' "

PIERRE AUGUST CAPDAU (Rec., 664), a pharmacist, for thirty years in New Orleans:

Recollected an interview with a representative of the Southern Koke Company.

665 "Sometime in May of this year some gentleman was in the store and he said, 'You don't handle "Koke" or "Dope," do you?' I said, 'Yes, sir, I sell "Coca-Cola."' 'Oh, that ain't right,' he said. 'We have got a trade-mark on the names "Koke" and "Dope" and you ought to sell it; every time you are doing that, you are violating the law.' 'Well,' I said, 'I don't see how—I have never known of a

man who asked for "dope" or "koke" at my fountain but what indicated a desire for "Coca-Cola" '; and he says, 'You will have to discontinue that because if you don't discontinue it, why it might cause you some trouble.' I says, 'Well, I will tell you, I will look after the trouble; I am convinced when a man comes
666 in here and says he wants "koke" or "dope," he actually means "Coca-Cola," and I have never had a man to contradict me on that score, except you, sir.' 'Well,' he says, 'we'll get at that, we'll get at that,' something to that effect. He left and I have never heard from him since. No, I did not ask this man what he would have understood if a person had asked for 'koke' or 'dope' if he had been running a drug store five or six years ago; you see, I wasn't really doing the arguing with this individual; he simply was inviting it, and, naturally, I wasn't going into it, but I did say to him this: That, in all of my experience, I have never had any difficulty in giving a man 'koke' or 'dope' whenever he would ask for it, and I did feel as though that expression had been used for so long a time I couldn't really see where he could have had a trade-mark or a patent on the words. 'Well,' he says, 'we have got it, and you will hear from it, you may hear from it yet on that subject.' I said, 'Go ahead, old man, these are my views and I stand by them; I feel that every time a man asks for "koke" or "dope" he means "Coca-Cola." ' "

CECIL V. ROGERS (Rec., 735), druggist, Dallas, Texas, has been in business for twenty-three or twenty-four years:

736 "I had a call from a salesman representing The Koke Company of Texas, in reference to 'Koke.' The salesman wanted to put in 'Koke' to be served at the fountain. While he didn't exactly make reference to the fact that it could be served for 'Coca-Cola,' he made mention of the fact that when people called for 'coke' give them 'Koke,' and when they

called for 'coke' that they were more than likely to mean they wanted 'Koke' than 'Coca-Cola'; and mentioned the fact that if I didn't give them 'Koke' and did give them 'Coca-Cola' that I would be infringing on 'Koke' inasmuch as they called for 'Koke,' and I gave them 'Coca-Cola.' You ask if I have ever known the name 'coke' to be used as a short name for 'Coca-Cola' prior to this; oh, yes, it has always been called 'coke' as far as I can remember. I have known of the product 'Koke' of the Koke Company of Texas not over three years. I was a soda water
737 boy about 14 years ago at the Palace Pharmacy, at which time people very often used the nickname 'coke' in asking for 'Coca-Cola.' I had a gallon of the product 'Koke' of the Koke Company of Texas in my store at one time. Yes, sir, at one time there was an experiment made by the Koke Company's salesman. A customer was drinking at the fountain and there was a little experiment made there claiming that the two drinks 'Coca-Cola' and 'Koke' couldn't be distinguished from each other, that they were so similar. My soda boy there made the experiment at the request of the salesman of the Koke Company. This customer, who was sitting at the counter there says, 'I bet you I can tell the difference,' he says, 'all right, we will have the boy mix them up and see,' and took some out of his bottle and had the boy mix them and made a 'Coca-Cola' too, and while he turned his back the boy set them on the counter—the boy knew which was which—he set down the one he thought was 'Koke' and picked up the one that tasted more like 'Coca-Cola' to him, so he said, and drank it, but he was right, however."

CHARLES R. SMITH (Rec., 746), drug business at Dallas, Texas, about fifteen years:

746 "A salesman representing the Koke Company
747 made an effort to sell me 'Koke'—'K-o-k-e' instead of 'Coca-Cola.' * * * They would make me a

price on the syrup, and then, after using so much of their product, I was to have so much stock in the Koke Company. And then they made the argument that they couldn't tell the difference between 'Koke' and 'Coca-Cola,' and would make me a saving in using their product, 'Koke'—it would cost less than 'Coca-Cola.' They said if people came in and asked for 'Koke' just to give it to them. Yes, sir; I was recognizing all this time that 'Coca-Cola' was being called for as 'coke'."

O. M. BROWN (Rec., 763), clerk at the Oriental Drug Store, Dallas, Texas, and in charge of the soda fountain:

"A representative of the Koke Company sought to have our people handle it [Koke]. He said it was cheaper and said there was no difference in it and 'Coca-Cola,' but I tasted it and told him that there was a difference and I believe anyone could detect the difference."

T. Q. MARTIN (Rec., 765), proprietor of the Owl Drug Store, Dallas, Texas, recollected a salesman of the Koke Company of Dallas calling; his name was Green:

"He came and asked me to sell 'Koke' and said it was just as good as 'Coca-Cola,' from the fact that it was being manufactured at Dallas, and, as a patriotic citizen, I should sell it, and that I wouldn't be deceiving the customers because a man should get what he called for,—if he called for 'Koke' that we should have the 'Koke' to give him. Well, I differed with him; I told him that people called for 'coke'—called it as a nickname for 'Coca-Cola,'—and I told him that was a nickname that people generally applied to 'Coca-Cola,' that I had myself observed 'Coca-Cola' around the fountains; that they would say, 'Give me a glass of "coke."' "

E. B. THOMAS (Rec., 766), who operates a soda fountain in connection with his confectionery business in Dallas, Texas, testified:

767 "A representative of the Koke Company tried to induce us to use the 'Koke.' My best recollection is that it has been over a year, maybe a year and a half ago. The argument he used was that I could make more money out of it than I could 'Coca-Cola.' Yes, sir, sell it to me cheaper; make me a better proposition. You ask if they said anything about its resemblance to 'Coca-Cola'—being similar or the same as it; to my best recollection, yes; they said it was practically the same thing as 'Coca-Cola.' You ask if they made any threats against me unless I sold 'Koke'; the best I remember on that, they said that when they called for 'Koke' that they were going to make us give them 'Koke,' and if they called for 'Coca-Cola' give them 'Coca-Cola.' That's my best recollection of it. I think the gentleman I was talking to is this gentleman here (pointing to Mr. Boyd[1]) I couldn't say as to whether or not he was connected
768 with the company in an official way. My recollection is he was manager, but whether he said that or not I won't say; that's the idea I have now—that he was connected with the company; whether or not he was manager or president I wouldn't say. * * * You ask if anything was said as to whether or not my customers would be able to tell the difference; well, I don't know exactly on that, but my best recollection on that is that there would be no one that would make a kick on it at all, if they called for 'coke' and we gave them 'Koke,'—there would be no kick on it; that it was a first-class article, and that I could sell it as good as I could 'Coca-Cola.'
770 * * * I think at one time they sent me down a gallon of 'Koke.' I put it in the pump, I believe I
771 told the dispensers to try it—a few of them that asked

[1]Boyd, though named as a witness by respondents was not called.

for 'Koke' were given it and one of the dispensers came to me a few days later—I don't know how many days it was, and said to me, 'You can't get by with that stuff, Mr. Thomas.' I said, 'Take it out of the pump.'"

C. D. KINGSTON (Rec., 791), druggist, Dennison, Texas:

"You ask if I have ever had an interview with a man representing the Koke Company of Texas, with respect to the product 'Koke'; I couldn't tell you whether it was 'K-o-k-e' or 'C-o-k-e'; I know I had a representative from Dallas trying to sell 'Koke' to take the place of 'Coca-Cola.' There was a gentleman with a Mr. Boyd who was with the Texas Drug Company, he introduced me to this gentleman,—I have forgotten his name—he asked me would I take a drink, and we lived in a dry town and I told him I would; he got a leather-covered flask from his pocket and started to fixing a 'Coca-Cola' highball; he said, 'Just try one,' and gave me the glass and he poured out one and said, 'Mix the two and taste the two and see which is better, if you can tell the difference'; I told him, no, that I didn't care to take a 'Coca-Cola,' I just had one, I thought he was going to give me a drink. He said he was selling 'Koke' at a cheaper price than 'Coca-Cola'—selling it at $1.25 a gallon. I told him I didn't care to put any 'Koke' in; that I was doing a nice business on 'Coca-Cola' and I thought it was a steal, that he was putting his out; well, he kind of got mad at that and didn't think it was a steal. He said he was vice president of the company and I told him I didn't give a damn if he was president of the company, that was what I thought just the same. He didn't stay very long and that was about the sum and substance of it."

F. L. SKILLEN (Rec., 792), druggist, Dallas, Texas:

793 "I had an interview with a gentleman selling 'Koke.' * * * He came in and introduced himself. I can't remember his name, in fact I couldn't remember your name that you told me yesterday, but he said he was selling 'Koke' and I told him that I didn't handle it. He asked me why I didn't handle it and I told him we didn't handle anything but 'Coca-Cola.' He says, 'What are you going to do when people call for "Koke"?' I said, 'I am going to give them "Coca-Cola."' 'Well,' he said, 'don't you know that you lay yourself liable to prosecution?' I told him I didn't think I did, that I didn't think any of my customers wanted anything but 'Coca-Cola' and that it was a free country and they had every opportunity in the world to prosecute if they felt that way, that we didn't sell anything but 'Coca-Cola' and would continue not to sell anything but 'Coca-Cola.' He then told me I ought to handle it. I asked his price and he said $1.25 a gallon, and I told him 'Coca-Cola' didn't cost us that much the way we bought it.

794 He was very persistent and I guess we must have talked for about three-quarters of an hour and I finally showed him the door. I told him that we believed and thought we were right, that ninety-nine out of every hundred that called for 'Koke' wanted 'Coca-Cola'—that I wouldn't state that positively, but that was our belief and we believed it so strong that that's what we gave them and we didn't have anyone to kick on it. He stated his product was cheaper than Coca-Cola."

GEORGE C. KERSHAW (Rec., 811), manager of the Dade Drug Company, Dallas, Texas:

"I had a visit from a salesman representing the Koke Company of Texas, in Dallas.

The only argument that he advanced was that I could buy it cheaper than I could buy 'Coca-Cola,'

and that I could sell it and realize more profit and the public wouldn't know any difference,—that I could use it as a substitute, in other words."

TONY GIARRAPUTO (Rec., 814, in confectionery business thirteen to fifteen years at Dennison, Texas:

"Yes,—it was a nice-looking gentleman come into my place and says he want to sell me something 'Koke': I tell him 'Is it "Coca-Cola"? ' He says, 'No, it's same thing exactly like "Coca-Cola," ' and they tell me it was one of the firm that used to be the one that makes 'Coca-Cola' makes it, and I tell him,—well, we were speaking about contract; I tell him, 'If you sign a contract which is pure "Coca-Cola" I will take a barrel on trial, but if it not good "Coca-Cola," if it's not "Coca-Cola," I send it back,' and of course, he forces me to sign a contract, and that they give me a share in the business, and before I sign a contract with you in regard to this business we got to go to lawyer, because I no sign no paper until I know what's doing, and of course, I never see this man no more, and he really no call on me since that time."

MRS. C. E. FLAGG (Rec., 826), confectionery and floral shop, Oak Cliff, a suburb of Dallas:

"I had an interview at one time with a salesman selling a product which he called 'Koke.' He wanted to sell me this 'Koke' for ninety cents a gallon. He said it would be a great saving as 'Coca-Cola' would cost me a dollar and fifty cents; I told him I didn't want it. He said you couldn't tell the difference between 'Coca-Cola' and 'Koke' and also that the people couldn't tell the difference between them. I told him when people asked for 'coke' that they wanted 'Coca-Cola' and he said that they didn't, that they wanted 'Koke'; he said, 'Of course, when people come in and ask for "coke" they want "Koke" ' and that we were supposed to serve 'Koke'; and I said,

'No, when a person asked for "coke" it's just a short way of asking for "Coca-Cola." ' "

PETER CAMARINOS (Rec., 827), confectioner, McKinney, Texas, testified:

827 "I had a call from a man representing the Koke Company here in Dallas—I couldn't remember exactly—two or three months ago. He had some 'Koke' which he offered to sell me. Tell me sell it cheaper than 'Coca-Cola' and make more money than I could by selling 'Coca-Cola.' You ask if he said I could sell it for 'Coca-Cola'; yes, sir. You ask if he said it was like 'Coca-Cola'—couldn't tell the difference, anything of that sort; no, he say people can't tell difference. * * * Yes, sir, he said to me that it was as good a drink as 'Coca-Cola' and he says I can sell it for 'Coca-Cola.' Yes, sir; I am sure he told me I could sell it for 'Coca-Cola.' "

T. J. BRITTON (Rec., 829), retail druggist, Dallas, Texas, testified:

830 "I recollect having a representative call upon me trying to sell me the product 'K-O-K-E' made by the Koke Company of Texas. I think it was about three years ago that he came in the store and tried to sell me some 'Koke' and, of course, the argument that they all put us is that it can't be told from 'Coca-Cola,' and I think it was cheaper—I think he offered it at about a dollar a gallon, and I told him, no, I didn't care for it, I didn't dispense anything but the genuine 'Coca-Cola' and had never handled any substitute for it; and, in the course of the conversation, he intimated to me that when I sold a man 'Coca-Cola' when he called for 'Koke' that I was substituting, and I immediately told him that he would have to withdraw from my office, that I didn't have time to talk to a man that would advance that kind of an argument. Yes, sir, the public, when

asked for 'Coca-Cola' at my fountain, prior to that time, had been asking for it under the name 'coke.'"

* * * "Yes, sir; when he began to ar-gue as to the right of his proposition, I shut off the argument and ordered him out—when he got to the point that I was substituting, I did. I cut him off when he began to argue as to the right of his position. Previous to that time we got in a little argument, and I just simply told him we had not been selling 'Coca-Cola' under the name of 'Koke,' when people came in and called for 'coke,' we had been selling 'Coca-Cola' for some little time, and his company were trying to steal the thunder of the Coca-Cola Co. That was my argument to him, and he was just trying to combat that argument. You say that when he began to advance the argument in support of his position that he had the right, then I stated that I had no time to talk to him further; when he told me I was substituting, when a man came and called for 'Koke' and I gave him 'Coca-Cola,' that I was substituting, I told him I didn't have any further time to talk to him."

J. M. PENLAND (Rec., 1978), president, Waco Drug Company, Waco, Texas, testified:

78 "I had an interview with a man, named Moore, representing the Koke Company of Texas,—I think it was in the spring of 1913,—in my office at Waco, Texas. Mr. Moore came into our place and solicited our business, wanting us to act as distributors for the Koke Company of Texas, and made us a price of $1.25 per gallon to any of our trade on direct shipments, or to us for our stock, and he offered as his argument for our handling it, that they were in position to give us this price because they were not doing any advertising, that the average person who called for 'Coca-Cola' used the word 'coke,' and that they would get the benefit of the advertising done by the Coca-Cola Company, and that the retail man could

conscientiously justify himself in dispensing 'Koke' on such orders or on orders that he thought was intended to be 'Koke.' "

EDWARD T. LANGAN (Rec., 894), 55 East Congress street, Chicago, testified:

895 "I recall an interview with a young man, Mr. Mayfield, who tried to sell me a product under the name of 'Koke' a short time after I went to the Auditorium Pharmacy. He was in there, I judge, about five or six times during the spring of 1913. I don't know exactly the words that Mr. Mayfield used, only he wanted to sell me 'Koke,' or some substitute. He claimed that it was made the same as 'Coca-Cola' and it could be sold the same as 'Coca-Cola' without anybody ever detecting the difference. You ask me to explain my last answer a little bit, and you ask if I mean that Mayfield told me that it could be sold for 'Coca-Cola' when people asked for 'Coca-Cola'; no, he said that the men who used to make 'Coca-Cola'
896 was now making this product, and, therefore, it was the same thing and it could be sold as 'Coca-Cola.'"

J. W. Mayfield was asked concerning the representations that he made to soda fountain proprietors, and stated (Rec., 1529):

"I cannot remember the different lines of talk I put up to the different soda fountain people."

And again (Rec., 1530):

"I cannot remember what I told those dispensers and proprietors. I never sold goods with the same

These statements are confirmed by the admissions of respondents' witnesses.

ROBERT E. OUSLEY, druggist of Kosciusko, Mississippi, a witness called by respondents, testified:

1447 "A traveling man came around and told me that Koke and Dope were copyrighted by the United States Government and we had as much right to sell it as Coca-Cola, when a man come in and said 'Give me a Koke or a Dope,' it was copyrighted. He said those two names are both copyrighted. He said 'Koke and Dope are copyrighted drinks, just the same as Coca-Cola is a copyrighted drink.' He said,
1448 'If you do not give him Koke or Dope you are infringing on our name as much as Coca-Cola or anyone else for that.' I bought it because I could know what they were calling for, Koke and Dope. It costs a little less than Coca-Cola. There is more profit over the counters. We put this in and when a man comes in and calls for a Koke or a Dope we give it to him and when a man calls for Coca-Cola we have Coca-Cola for him which we always have. He just said 'This is a Cola drink, he said a Cola drink.' I do not remember him saying it tasted like Coca-Cola. He made the drinks and showed them to me.

He had a sample, and he said, 'Here are two drinks.'

Q. 122. Oh, two drinks. What about the other one? Did he ask you to draw a Coca-Cola from your fountain?

A. He did not draw a Coca-Cola. He said, 'You know what Coca-Cola is.' He said 'Here is my cola drink.'

Q. What two drinks are you talking about?

A. Koke and Dope.

Q. Is that two drinks or the same thing?

A. The same drink,—and he said, 'There is your Coca-Cola.'

When people come in and ask for Koke or Dope we give them that one thing which comes to me, Koke or Dope. It comes from the Southern Koke Company of New Orleans."

HUGH LEE BOYD, druggist, Kosciusko, Mississippi, respondents' witness, testified:

1455 "I bought this product from the Southern Koke Company from Mr. Patton. Think he told me about this Koke and Dope, that he was handling, and wanted to put in some. He said it sure was a good thing and he was selling a good deal of it. He had a sample and mixed a drink. I did not know which one I was drinking, Coca-Cola or it. He never said a word about it being like Coca-Cola. He told me I could not tell them apart, I think."

MAX BLOOMSTEIN, druggist, Nashville, Tennessee, called by respondents, testified:

1148 "I have been handling Koke and Dope about a year or such a matter. It comes to me labeled Koke or Dope. I changed to Koke and Dope because Koke and Dope are copyrighted names and I thought I was liable to indictment if I served anything else. When I was first approached to buy Koke and Dope I refused to buy it. I told them I had as many of those drinks as I wanted, and a card was handed me on which I saw that Koke and Dope were copyrighted. I immediately went to my soda dispenser and told both of them if anybody asked for Koke or Dope for them to be very particular and ask if they wanted Coca-Cola. I know there are a whole lot of men out in the employ of the Coca-Cola Company and I did not want them to trap me. I am not particularly fond of lawsuits and for that reason I know if a man asked for a koke or a dope and knew of the Koke and Dope preparation, he wanted that. If

he meant Coca-Cola he wanted them to give him Coca-Cola so I told my dispensers if anyone asked for Koke or Dope to ask the question, 'Do you mean Coca-Cola?' Some did mean Coca-Cola and some did not mean Coca-Cola, but there were some of them that took offense at the question: 'What do you mean, Coca-Cola?' Some says: 'None of your damn
1149 business, you ought to have enough sense to know,' or words to that effect. They became angry and at the end of two days my head dispenser said to me: 'I think you had better not make us ask that, we are offending some of our customers, they seem to take offense.' Because they all considered we should know what they wanted. It is pretty hard to know just what one will become offended at. * * * That is one of the kind of cards that was handed to me, as well as I can remember (indicating a card known as Exhibit No. 9), stating on it that Dope and Koke were copyrighted names. That is the reason I made my change from selling Star-Cola when Coke and Dope were called for, to Koke and Dope when Koke or Dope is called for. * * * There was a time I handled Coca-Cola and did not handle some similar drink to it. I do not remember there were very many calls for Koke and Dope at first, it has only been within the last few years that the slang has crept
1150 around amongst the young people. The better class of people coming into the store do not call for Koke or Dope, they call for Coca-Cola if they want it. I gave them Coca-Cola when they called for a Dope or a Koke at that time. I changed it to Star-Cola because Star-Cola was considerably cheaper. Koke and Dope are cheaper than Coca-Cola."

SCHEDULE VI.

Respondents' Product Has Been Systematically Passed off on the Public as and for Coca-Cola.

B. W. FULLER (Rec., 833), Dallas, Texas, dispenser at Kirby Drug Company and the Palace Drug Store:

833 "You ask me if they complained when I served them 'Coca-Cola'; yes, sir, they complained when I gave them 'Koke.' They complained—I say they meant 'Coca-Cola.' The Kirby Drug Company at one time dispensed 'Koke' over its counters. They carried it exclusively as long as they lasted,—the last month or so while I was there. You ask if they sold it as 'Koke' or as 'Coca-Cola'; they sold it as both.

834 If a man came in and called for 'Coca-Cola' they served him 'Koke'—they didn't have anything else to serve him. Sometimes they told him what they were selling, told him it was 'Koke,' and sometimes they didn't—supposed to tell it along towards the last, they were supposed to tell him it was 'Koke.' You say you are not trying to find out what they were supposed to do, but whether 'Koke' was sold by the Kirby Drug Company as 'Koke' or as 'Coca-Cola'; as both—first it was sold at 'Coca-Cola,' as long as it lasted, and then they sold it as 'Koke.' It must have been about a month, I guess, that they sold it as 'Coca-Cola.' No, sir; they did not have any 'Coca-Cola' in stock when they were selling them 'Koke' for 'Coca-Cola.' One reason why I quit them was on that account, I had so much trouble about the 'Coca-Cola' customers. They kicked on it. The customer that came in there, one thing would bring on another, about what the drink was, that it wasn't right, that they wanted 'Coca-Cola' and couldn't get 'Coca-Cola' and got 'Koke'—they would be dissatisfied. You ask why, then, did I quit, and why I could

not have told them when they were asking for 'Coca-Cola' that I was serving them 'Koke'; I did tell part
835 of them and they all quit. * * * Along towards the last I served it as 'Koke' to those people, but at first I served it as 'Coca-Cola.' You ask if I then had some complaint made to me by my boss; he told me to sell 'Koke' for 'Coca-Cola' and that's all the complaint I had. Yes, sir; I charge my boss Mr. Blakeney with telling me to sell 'Koke' for 'Coca-Cola.'"

D. P. ENGLISH (Rec., 802), druggist, Dallas, Texas:

802 "I was with the Palace Drug Company for several months. They handled 'Koke' and I think they handled it exclusively. I don't think they handled any 'Coca-Cola,' I never knew of them buying any while I was there. They got this product 'Koke' to which I refer, from the Koke Company in Dallas, Texas, in barrels, colored red. * * * When people come into the Palace Drug Store and called for 'Coca-Cola' they would serve them 'Koke.' I never heard them advise them that it was not 'Coca-Cola.' That practice continued in the Palace Drug Store for about three or four months, I think, in 1913, and ceased when Messrs. Florence & Nossick got it. Before the latter gentlemen got hold of the business, Pyle was manager of it. I don't know who were its owners, it was a stock company. This new concern bought it out, I believe, about the 15th of July, 1913, and they immediately went to ordering 'Coca-
803 Cola.' I left there on the first of December, so I don't know anything about their business since then. * * * Yes, sir: I mean to say that I served 'Koke' to those people for 'Coca-Cola.' You ask who told me to do that; it was put in the jar and labeled that and it was their method of doing business, it wasn't my business to get up and publish these things, I was paid to sell a man this stuff and I would just sell it. It was the business of the Palace Drug Com-
804 pany, I was just working for them. You ask what I

know of their methods; well, I know they had the jar labeled 'Coca-Cola'—I know they wouldn't expect me to get up and go ahead and explain that it wasn't 'Coca-Cola,' I noticed the fountain men didn't do it, if that had been their intention, or if they wanted it done they would have notified me. Yes, sir; I did see a jar labeled 'Coca-Cola.' I am sure they did have such a jar and I am sure it contained
805 'Koke.' * * * You ask if I reported to anybody that I was selling 'Koke' for 'Coca-Cola'; I discussed it with men there in the store, and they argued there was more profit in selling 'Koke' than there would be in selling 'Coca-Cola' and you would get just as many customers as you would by selling 'Coca-Cola.' You ask if it was not well known that our store was carrying 'Koke'; it was among the boys in the store." * * * "I talked it over and Mr. Pyle told me he considered it was making more than he could with 'Coca-Cola' and that he didn't lose any customers. You say that that's entirely consistent with the idea that I was selling 'Koke' and you ask me the specific question did I tell him that I was palming off 'Koke' for 'Coca-Cola'; he knew it. There wasn't any occasion for me telling him." * * *

The admissions of dealers handling respondents' product and called as witnesses by them shown in the following extracts from the record, demonstrate the deliberate, and systematic passing off of the respondents' product for Coca-Cola:

C. P. EMBREY, druggist, Chattanooga, Tenn., a witness for the respondents, testified:

1022 "I heard the term dope used. At that time there was no other drink on the market but Coca-Cola, and I understood that was what they wanted. That was
1023 what I understood they meant by Dope. At the time I handled Afri-Cola and Coca-Cola alone and a

man came in and called for a dope, I gave them Afri-Cola. Because of more profit. When I put in Ko-Nut I gave up Afri-Cola. Afri-Cola is not nationally advertised, I do not think. When a customer asked me for a dope I gave him the only thing we had, Ko-Nut. The drink was palatable and pleasant to the taste and another reason was because I made a better profit. Now, when a person asks for dope, I give the one we make the best profit on, which is either Koke or Ko-Nut. * * * We serve Koke when dope is asked for. I have been handling Koke for about two years. Commenced using one urn for Coca-Cola and one for Ko-Nut or Koke since January, 1914, before that time I was serving both ways, in bottles. I had one bottle sitting on one side. I might have served Ko-Nut, Coca-Cola and Dope out
1026 of the same urn. * * * When a man came in and asked for a dope at that time I had those two dispensing bottles up there and Coca-Cola in the fountain, I gave him either one, Koke or Ko-Nut. I never gave him Coca-Cola because I thought it was more profitable. I quit selling Coca-Cola in response to calls for Dope when these other drinks came out which were cheaper. * * * When a person came
1027 in and asked for a Dope I gave him Coca-Cola, but since these cheaper products have come on the market we give the cheaper product. That is the instructions at our place to our men. * * * Until these cheaper products came on the market I understood Dope to mean Coca-Cola. The cheapness of the product was what changed me. * * * There is no question about the drinks being of the same color and taste, and I cannot tell the difference. * * *
1035 Prior to the time I had Ko-Nut and Afri-Cola, I had calls for Koke. I gave them Coca-Cola. That was what I understood they wanted at that time. Koke and Dope do not mean anything particular since the low-priced drinks have come on the market. I do not sell Coca-Cola now in response to either call. and if Coca-Cola was the same price as these others

I would sell it in response to orders for Koke or Dope. * * * I changed the system to avoid the
1037 possibility of substituting. You see a boy would not be as discriminating as a man and it may be that they did substitute."

J. B. FREED, of Freed & Haas, Nashville, Tennessee, 113
called by the respondents, testified:

1174 "My instructions to all my fountain boys, whenever we get a new man, is to tell him when a man calls for Coca-Cola to give him Coca-Cola, and if he calls for Dope or Koke, to give him other things the profits are better on, to always give them what they call for. That is on account of the profit. I am working for Freed & Haas, not the Coca-Cola Company. I have had the Coca-Cola Company representatives come there and take out a drink and push a Coca-Cola back and say it was not their drink. I
1175 said whenever they wanted to get a soft drink or a 113
substitute, to call for it. I did not give it to them. I have always gone to the fountain and told the boys to set up two drinks, put one Coca-Cola and one Dope, and push the Coca-Cola to me and the Dope to the gentleman, and I would give him a wink and say 'Drink this,' then say to him, 'Drink that,' and for him to tell me which it was, and he would push the koke* back and say the other is the Dope. And I would give him a sample of the syrup out of each barrel so as to show which is Coca-Cola and the other Dope."

1137

*Attention is called to the fact that this adverse witness unconsciously uses the word Koke meaning Coca-Cola, showing how firmly the nickname is established. 1138

JOHN R. PARDUE, Assistant Manager and head dispenser of the soda fountain, Freed & Haas, Nashville, Tennessee, another of the respondents' witnesses, testified:

134 "Some customers called for Coca-Cola, some for Dope and some for Koke. We have had a few calls for a shot in the arm. When a customer asks for a Dope or a Koke I give him what he calls for. If he calls for Koke I give him a Koke. If he calls for a Coca-Cola I give him Coca-Cola. Mayfield makes Koke. * * * When a customer comes into our establishment and asks for a Koke or a Dope I do not know what he wants any more than I give him what he calls for; in other words, I give him the drink that costs the less money in response to Koke or Dope. I give him Mayfield's Koke or Dope, that costs less than Coca-Cola. * * * When customers
136 ask for Koke I could not say and know that they want K-O-K-E but a fellow would be a damned fool not to give Koke that costs less than Coca-Cola. If you were working for me and give Coca-Cola syrup that costs me more money to a fellow who did not call for it, I would not fire you but I would pick you up and throw you over the counter. If he calls for coke or dope I am giving him the cheapest syrup I have on the fountain * * * I fooled one of the Coca-Cola men and offered to bet him about it, but he would not bet. He took Mayfield's Koke and thought it was Coca-Cola. * * * I gave orders for that to the three boys at the fountain. I says, 'If they want Koke or Dope give them Mayfield's
137 stuff; if they want Coca-Cola, give them Coca-Cola.' Their instructions were to give them what they called for. When Koke, Dope, Shot in the Arm, and those terms are called for I serve the cheapest drink I have got. It applies to a cola drink. I do not know that they want Coca-Cola. I have never served Coca-Cola in response to calls for Koke, Dope or Shot in
138 the Arm. I do not know whether the nicknames

apply to Coca-Cola. They want a drink on that order, a cola drink. I don't know whether some of them mean Coca-Cola. I take it they want a cola drink, because those drinks are cheaper, that is the reason. I do not know whether they want a Coca-Cola or not. I feel justified in giving them what they want if they do not call for Coca-Cola. * * * I first heard the expressions Koke and Dope some ten
1139 or twelve years ago, I think. * * * Have heard Dope and Koke in connection with Coca-Cola at that time. * * * Don't know of any person call-
1140 ing for Koke or Dope at Fried & Haas' that knew we handled it."

E. A. SHARP, druggist, Jacksonville, Fla., testifying for the respondents, said that he had handled Dope for about three years and obtained it from the Koke and Dope Company at New Orleans:

1253 "I gave anything we wanted to when they called it 'dope,' except Coca-Cola. We had a drink that did not cost as much as Coca-Cola. These other drinks cost us less than Coca-Cola and that is the
1254 reason for it, everybody does it. * * * If a man comes in and asks for Koke or Dope, I do not know he wants Coca-Cola. If they call for dope they get dope. Gay-Ola costs us less than Coca-Cola, and it is sold for the same amount to the consumer, there is more profit in it to us. It looks and tastes like
1255 Coca-Cola. * * * A lot of people think there is not but one cola drink in the world and that is Coca-Cola. When they called for Dope they got Dope regardless of the cost, that did not make me give it to them any quicker. We give them what they call for regardless of cost. When they call for Dope and Koke we give them Dope and Koke. We gave them various things when they called for dope and koke at first because they do not specify the different drinks, we were privileged to use what we wanted and naturally we gave the cheaper drink.

* * * I do not say what people think because I do not know. * * * Some people may term Dope and Koke as Coca-Cola, but we never did term dope as Coca-Cola, unless they specifically said after ask-
256 ing for Dope that they wanted Coca-Cola. We would rather serve something else we made the most money on. I suppose I could sell Coca-Cola as Dope too, if I wanted to; you can use it as you like. I said I can serve anything I like when they call for Dope, it is not Coca-Cola. I consider the cost when I am selling it. We consider Dope applies to any cola drink as long as it is a dope. I do not know whether they are all cheaper than Coca-Cola, all that I have handled are cheaper. You can serve anything you like for Dope and naturally a man would give the drink he made the most money on. There was no excuse to it; we gave them Dope or Koke either one if they did not ask for Coca-Cola; they did not ask for Brain-Ol or Gay-Ola we gave most any kind of dope. We are always looking for something to make more profit and that includes the whole business. When the public commenced using the terms Dope and Koke, we could sell dope and Koke and I was glad it was there; I am glad to make more profit, naturally. All these drinks are similar in color and taste to Coca-Cola and are cheaper than
260 Coca-Cola. * * * I do not know that I can say I never had served any other drink besides Coca-Cola when Coca-Cola was called for because you are liable to get them mixed up in a soda fountain. They are so much alike I think anybody is liable to get them mixed up."

R. A. THORN, druggist, Meridian, Mississippi, testifying for the respondents, said:

123 "I have been dispensing Coca-Cola ever since it was brought into the state, I think, about 24 years ago. I am handling Coca-Cola now. When I was handling Coca-Cola and before I handled this

Konut, Gay-Ola or Afri-Cola, when a man came into my place of business and asked for a Dope or a Koke we gave Coca-Cola. I thought he meant Coca-Cola, because that was the only thing that was handled at that time as Dope. It goes back twelve or
1424 fifteen years ago. * * * When a man comes in now and asks for a Dope or a Koke I give him out of the Dope or Koke container, the product of the Southern Koke Company, Limited, and every time a man comes in and asks for a Coca-Cola, I give it to him out of another container. * * * I told them when Dope was called for to serve the Dope syrup, and when Coca-Cola was called for to serve the Coca-Cola syrup. The Dope or Koke syrup is one syrup."

H. F. CHRISTLER, druggist of Jackson, Mississippi, called by the respondents, testified:

1435 "If he knew the man asking for Coca-Cola wanted Dope, that he had been trading at the store before and knew that he wanted Dope, he would draw them out of the same container. He will know from past experience that he wanted Dope, and we give Dope and he is satisfied. I do not think that is substitution. It may be legally substitution. The reason it is not substitution is that because before I have served them with Dope syrup and he has liked it and I do not think that is substitution and he apparently liked it and does not kick."

DR. J. G. PYLE, owner of the Palace Drug Company of Dallas, testifying for the respondents, is confused between Koke and Coca-Cola. He said:

1721 Q. 19. "Did a representative of the Coca-Cola Company ever call on you? A. Oh, yes; sure.

Q. 20. Who was that? A. Why, Mr. Boyd, I think represented them.

Q. 21. The Coca-Cola Company? A. The Coca-

Cola Company, I thought you said the Koke Company.

Q. 22. Yes.

* * * * * *

723 There was about a week or two there I think, that I did not have any Coca-Cola, after Mr. Harris rounded me up so, I never ordered any more then for awhile and I think I got out for a week or two, I don't remember the exact length of time, I know I was out a little while, and during that time I told the boys to tell them that we did not have any, that we were out. So far as I know they followed my instructions, but you cannot tell about a soda boy, they 724 may do anything. * * * At that time I was in the soda business and the word, I just heard it in the store. I had talked about Koke, fellows drinking Koke, and so on, and being great Koke drink- 725 ers. I do not know what drinks were referred to in that connection. I never had handled anything called Koke at that time; they may have been talking about Coca-Cola, and may have been talking about Koke. It might be possible and very probable a lot of people may call for Coca-Cola when they call for Koke. Maybe some shorten the name into Koke. I instructed my boys when we handled both if they call for Koke to give Koke and if they call for Coca-Cola to give Coca-Cola. I never did hear anyone kicking about it. If they wanted Coca-Cola and drank Koke they did not object. I tell them to do that because I never could tell the difference. I only handle Coca-Cola at our store now. The boys know we handled Coca-Cola and give Coca-Cola. I guess we do not give Koke because we do not handle it. The customers have not kicked. * * * 726 I do not know whether Coca-Cola was called Koke in 1903 or not. I never had heard it called Koke up to that time I was out there. I am satisfied of that, but the name is used more and more up till this day; it is used more now than before. A man calls for Koke and lots of times now I do not know whether

he means Coca-Cola or Koke. Before the Koke Company of Texas started in Dallas, it is possible—I say it is not improbable, that they did call Coca-Cola Koke at that time; they may have done so. Before I bought anything from the Koke Company, I think I heard Coca-Cola called Koke, I could not say, I could not call any certain time when it was
1728 called Koke. * * * It would not be difficult for the soda man to know which he was serving. I cannot tell the difference either in taste or appearance of Koke and Coca-Cola. The man who came in and asked for a Koke was served with the product of the Koke Company of Texas. That is what I instructed my boys to do. Of course, I could not stand there and watch them and see what they were serving. I took it they did what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. They could have mistaken one for the other if they had been side by side and no labels on them. They could have gotten them mixed up, but we were very careful not to get one in the other;
1727 there was no reason to do so. * * * Koke syrup costs us less than Coca-Cola."

The admissions of the witness Pyle, who, by the way, owned stock in the Koke Company of Texas (Rec., 1728), confirm the testimony of the witnesses Fuller (Rec., 833) and English (Rec., 802), dispensers at the Palace Drug Company, Dallas, who testify that they passed off Koke in response to calls for Coca-Cola. (*Ante,* pp. 102, 103.)

C. J. THORNTON, druggist, Hattiesburg, Mississippi, called by the respondents, testified:

1772 "Customers using the term Dope or Koke, anybody knows they wanted a cola drink. Because I had good common sense, and a man with one-third or half sense would know that, when a man asks for a Dope if he has sense enough he knows he wants a cola drink. If they wanted a particular drink they

would ask for it. Whenever a man come in and was particular enough to ask for a Coca-Cola, we were always particular enough to give what he asked for. When a party comes in and asks for a Dope they want a cola drink; that is what I know. I know from being around the soda fountain, putting it out, and I know if they come in and ask for a Dope and I give them a lemon soda they would throw it in my face, the particular ones, and the ones that want
773 Coca-Cola ask for it. How would I know that they wanted a Coca-Cola drink when they asked for a Dope? How do I know they want a Coca-Cola? When they ask for Coca-Cola I give them all credit for having sense enough to know what they want. I think when he asks for a Dope that he wants a cola drink; I never go into the details. There are a few people in town, regular customers, who walk in and say, 'I want a Coca-Cola.' You can pretty nearly always tell when they want a Coca-Cola. That is so. At one time the Coca-Cola people came in here with some pimps, and got around on the street kinder circulating around, you know, about poison, that some of the drug stores here were selling stuff that was poison for Coca-Cola, and they went so far as to advertise, the Coca-Cola Company has, on the different places, to ask for Coca-Cola by name, and that went along so when the street car boys I noticed would come in and ask for Coca-Cola. They would ask for Coca-Cola; they got it; people that had been asking for Dope got it; asked for Coca-Cola. They run it up here one week where we would use usually a gallon of Coca-Cola every other day, where we had been using a gallon a week sometimes. The Coca-Cola people advertise, ask for it in its own name. They do that they said to avoid substitutes. It went pretty hard and we had to pay a dollar and a half a gallon for that when they said ask for it by name to avoid substitution, for a man to ask for it. I do not remember they said not to use nicknames. I think they had one on at the picture show down

there. Coca-Cola costs a dollar and a half; Koke a dollar a gallon. I handled them because it was better; is a better stuff and gives better satisfaction. There was more profit in it. We got the same price over the fountain. I handled the Dope because I like it better and because it gives better satisfaction than Coca-Cola at a less cost. I said I liked it better than Coca-Cola; it gives satisfaction. I base my better satisfaction when you take it up and drink the whole thing down and say, it is a good drink. I do not suppose any customers knew what they were getting. * * * If you want to go to assumptions, I just assumed if they wanted Coca-Cola they would ask for it; if they called for Dope they wanted a cola drink."

A. S. Goody, druggist, Lucedale, Mississippi, respondents' witness:

"I dispense Dope and Coca-Cola. This Dope is bought from New Orleans, the product of the Southern Koke Company, Limited. * * * I have been handling the product of the Southern Koke Company, Limited, about two years. I handled prior to that time Coca-Cola exclusively. I had calls at my fountain prior to the time that I handled the product of the Southern Koke Company for Dope or Koke. * * * I give Coca-Cola on calls for Dope and Koke. I did not understand it. * * * I put in this product called Dope by the Southern Koke Company, Limited, about two years ago. I do not know the exact date. This product cost me one dollar twenty-five a gallon, with a twenty-five cents a gallon rebate if you pay within thirty days. Coca-Cola cost one dollar-fifty, a rebate of five per cent, I believe, if you buy one hundred gallons and more for larger quantities. * * * My instructions in that connection is if a man comes in and calls for Dope, give Dope; and if he comes and calls for Coca-Cola, give Coca-Cola. I do not know anything about what he wants. I give him what he asks for. I

give him the one made by the Southern Koke Company, that is the cheaper product of the two. I make more profit on it; it costs us less money. It is not why I do it. I do it because it is what they ask for. I do not know what they want. I give them what they ask for. I do it. I just want to make it clear to you that I would do that if that were the higher priced product. I will say this, that I have some customers who tell me that they want Coca-Cola, and in fact I can name two, Mr. Boling and Mr. Johnson. They frequently call for a Dope and we always give them Coca-Cola. The dispensers know them and know what they want and always give Coca-Cola. When customers ask for Koke I give them Dope; sometimes I might get it mixed up and give Coca-Cola. Dope and Koke, the Southern Koke Company claim in their letters and advertising, they state that the two products are the same. One product with two names is the impression I have. I do not know about that. When a man comes in and asks for a Koke I give the product of the Southern Koke Company. I suppose when they ask for Dope I give Dope, and when they ask for Coca-Cola I give Coca-Cola, and when they ask a usual thing I think we give Dope. Prior to handling the product of the Southern Koke Company, about two years,
793 with the exception of one barrel of Gay Ola eight years prior to that, people who asked for Dope and Koke at our fountain were served Coca-Cola. I do not know what the people want when they ask for Dope or Koke. I serve the product of the Southern Koke Company. That is cheaper than Coca-Cola."

E. J. WILLIAMS, druggist, Hattiesburg, Mississippi, one of the respondents' witnesses, testified:

811 "I dispense Koke and Dope which I get from the Southern Koke Company of New Orleans. I could not tell you when I first heard the expression Koke and Dope. I have been calling for it that way my-

self ever since I can remember drinking Coca-Cola.
1812 I do not know what I wanted when I asked for Dope back there in those times. I just called for a Dope. Sometimes I reckon I wanted Coca-Cola; that is, a great many people, I reckon, when they wanted Coca-Cola would call it Dope, Dope or Koke. I do not know as that is true to-day. I do not know what a man wants when he asks for a Dope, whether Coca-Cola, or what when he calls for Dope or Koke. To-day, if a man would ask for a Dope I would give him Dope or Koke. I do that because I have it in stock; I give him what he calls for. I have Coca-Cola in stock. I would not refuse to give him Coca-
1813 Cola, and we do do it, I have seen the boys do it, I have done it myself. As a rule, we give Koke or Dope. It is to my interest to do it, that is about all,
1814 and I try to give him what he calls for. * * * If he wants Coca-Cola and calls for Koke or Dope he won't get Coca-Cola, if that was what he wanted. That is my choice in the matter. I am at liberty to do it and that is the reason I do it because I want to, because I like to do it. It is fifty cents a gallon cheaper; I guess I look after the most in that line. I keep that out as Koke or Dope. They come in and call for Koke or Dope, why would I give Coca-Cola when Koke or Dope would do? I give him what he calls for. We have made that rule here, as well as we could to give exactly what he calls for."

W. A. Hickman, Monticello, Mississippi, respondents' witness, testified:

1821 "I am in the drug business in which I dispense Coca-Cola, Dope and Koke. Koke is made in Atlanta, I guess. The Dope product we got from New Orleans, the Southern Koke Company. * * * I
1823 do not know whether people that ask for Dope or
1824 ask for Koke may want Coca-Cola. You take people where I am they do not know; you cannot find two out of ten there that know Coca-Cola from Dope; they are not used to them; I have tried the two

drinks. A lot of people they could not tell the difference in Coca-Cola from Dope and Koke; there may be people that can. The two drinks look the same and taste the same; a customer receiving it would not know the difference. Prior to going into the drug business I was salesman in a drug store. I have heard the terms dope and koke used before I went into the drug business. I knew of different matters; I knew there was two companies handling
1825 it; a lot of people do not know it. * * * I never serve Dope or Koke when Coca-Cola is called for; if they ask for Dope I give Dope. For a Dope he gets Dope and if he asks for Coca-Cola he gets Coca-Cola. * * * I buy Koke and Dope from the
1826 Southern Koke Company; Koke or Dope is the same product; it costs a dollar and a quarter and I get a rebate. I get a rebate of 25 cents for paying in a certain length of time; if it is not paid then it is the full amount. We are rebated for the number of gallons we use during the year for Coca-Cola. I handle this product because it is cheaper than Coca-Cola; that is my reason for handling it, but if he asks for Coca-Cola he gets Coca-Cola every time. I make more money on it and get the same price for the product over the counter; it is as good a drink, and he cannot tell the difference from the Coca-Cola. I will bet you I can go to the fountain and you cannot tell the difference. If he asked for Coca-Cola and I served him Dope, he would not know the difference. I guess that is very nearly true of every customer. * * * A few I do not tell and a few I do. I do not get outside and tell it you know. I handle these other products because they are cheaper."

T. H. Lever, druggist, Spartanburg, S. C., testified for the respondents:

1237 "I do not remember the name of the Sizemore product; I do not know that even if it had a name. If I was at the soda fountain and a man called for dope I would not necessarily think that he wanted

Coca-Cola, and I gave the drink there was the bigger margin of profit in, a drink without a name. That was the only drink similar to Coca-Cola. * * *
1238 Prior to the time we handled this Sizemore's drink,
and a man asked for dope, I gave him Coca-Cola as
1239 a rule. * * * After I became acquainted with a good many people at the K-W-N and they called for dope, I served Coca-Cola because I had nothing else in the house. * * * I changed because the representative of the Koke and Dope Company showed
1240 me where it was a legal syrup, a legal proposition that I could handle it through legal channels. Naturally, it was one dollar a gallon, a little more of a bargain to the drug store, and I handled it for that reason, and the reason that they had the words 'koke' and 'dope' copyrighted. This representative of the Koke Company showed me a sample of the syrup. He did not tell me that when 'Koke' and 'Dope' were called for I had to sell their drink. He said, 'Here is a syrup you can make a larger margin of profit on than any other drink you handle, as for instance
1241 Coca-Cola.' * * * I have had people say they could tell the difference in Koke and Dope and Coca-Cola, and I would just set them out and say, 'Can you see the difference in these two drinks? Taste them,' and as a general thing some say they can and some say they cannot. * * * Up to June I had never handled any drink that was similar in appearance to Coca-Cola. I had two separate containers because they were separate drinks. I used it (Dope) at the soda fountain just the same as I used any other drink. I bought it and was buying it under this name and I used it under this name, sold it under the name."

In the following instances bottled Koke was passed off without comment in response to requests for Coca-Cola:

Name of Witness	Date	Record Page	Place	Name	City	State
Clarence J. Hogan and B. J. Gillon		648	Cafe	Tranchina	New Orleans,	La.
"		659	"	"	"	"
"		660	"	Bob Kitchens	"	"
"		660	Saloon	Wendt	"	"
"	4-24-13	660	"	"	"	"
"	4-27-13	660	Cafe	Tranchina	"	"
"	4-27-13	660	Saloon	Bob Kitchens	"	"
"	4-26-13	660	"	Shepherd	"	"
"	4-23-13	660	"	Wendt	"	"
Frank J. Bogner	5-7-13	651	"	Springer	"	"
"	5-3-13	651	"	Bauman	"	"
"	5-3-13	651	"	Gimilli	"	"
"	5-2-13	651	"	"	"	"
"	5-8-13	651	"	Bauman	"	"
"	5-7-13	651	"	Bauman	"	"
"		651	Cafe	Martin	"	"
"		651	"	"	"	"
"	4-30-13	651	"	Curbers	"	"
"	7-11-13	652	Saloon	Curran	"	"
"	5-8-13	652	"	Springer	"	"
"	5-6-13	652	"	"	"	"
"	5-6-13	652	Cafe	Martin	"	"
"	7-9-13	652	Saloon	Curran	"	"
"	5-1-13	652	"	Gimilli	"	"
"	5-1-13	652	"	J. W. Lotz	"	"
"	4-30-13	652	"	"	"	"
"	5-5-13	652	"	"	"	"
"	7-10-13	652	"	Curran	"	"
George H. Wilkins		867	Grocery	Clarke	"	"
"		867	Saloon	Comus	"	"
"		867	"	"	"	"
"		874	Grocery	Sanitary Co.	Ft. Worth,	Texas
"		874	Park	Trinity Park (Frank Ford)	"	"
"		874	"	Lake Erie Park (Tom Bunch)	Handley	"
"		876	"	"	"	"

These bottles are in evidence as Plaintiff's Exhibits 111-151.

SCHEDULE VII.

Testimony Showing Respondents' Actual Fraudulent Purpose to Pirate Petitioner's Business.

W. McCarty Moore, of Dallas, Texas, an incorporator of Southern Koke Company, Ltd., and other Koke Companies, and once president of the Southern Koke Company, Ltd., and the Koke Company of Texas, testified:

1738 "I had understood that there was a chemist who had formerly been with the Coca-Cola Company, or rather had formerly been a partner in the Coca-Cola business, who had been trying to compete with the Coca-Cola Company for years under various and
1741 sundry cola beverage names. I was president of the Koke Company of Texas. * * * I had never
1751 been in the drug business or had any connection with the soft drink business of any sort prior to my connection with the Koke Company. I knew of the product Coca-Cola and had known it for quite a long while. I knew it was well advertised and a popular drink, and I thought in getting into the Koke Company or going into the soft drink business was to compete with Coca-Cola. The Koke Company was known as a competitor of the Coca-Cola Company and Koke as a competitor of Coca-Cola. That was what I went into the business for.

1752 Q. Mr. Moore, had you ever heard anybody ask for Koke or use the word Koke at a soda fountain prior to that time? A. Yes, sir. If you want a specific case, I remember quite well at this same fountain of Smith Brothers at McKinney, where I bought a drink quite often, several times a day. I never did drink Coca-Cola and it was just due to the fact that I had a ticket possibly, I had one glass. I never could drink it because it unnerved me so; it was not a very palatable drink. I did not drink and I did

not drink Koke very much. They were handling Coca-Cola and making Celery-Cola when any one called for that. At that fountain people asked for Koke. I could not say what was served to them in response to that request; it might have been Coca-Cola; I presume it was; it might have been some other cola beverage, I was not acquainted with the business and could not say. * * * I took those various labels to the printer and took the square label that Mr. Mayfield said he had been using at Shreveport. I took a Coca-Cola label, and I do not remember whether it was Dr. Pepper's label or Jersey Creme; I think it was one, possibly Dr. Pepper, or it might have been Pepsin. I think I had some three or four labels. I am right sure I had a Gay-Ola label, if I am not mistaken; that I won't be positive about, but I know two that I had positively, and
1754 that was the square label of Mr. Mayfield's; it had Koke on it in script, and the Coca-Cola label, and I think a Jersey Creme label. I discussed with him the advisability of a square label or a diamond label. The printer followed the Coca-Cola label out more closely in the Koke label than he did follow the Mayfield label. If we had made an exact facsimile label at the time, using the word Koke on it, I for myself would not have felt I was doing it for the purpose of any infringement or deception. I here acknowledge and state I had no experience whatever. I was advised I had the right to use the name Koke. I presume the question was discussed at the interview we had with counsel, that Koke was used by the public as an abbreviation for Coca-Cola. I am pretty sure we discussed mighty near everything that was possible to discuss regarding it. I know I went very carefully into it and discussed every possible phase of it. We were advised we had no right to sell our product as and for Coca-Cola when Coca-Cola was asked for, of course, and vice versa that they had no right to sell Coca-Cola when Koke was called for. I was advised that Koke had been registered and that

registration gave us the exclusive right. The Koke Company had the right to use it as applicable to the product it was marketing under that name. The
1756 registration gave that right. * * * I would just as soon put it out under some other name; I could have done better, I guess. Perhaps it would have avoided suits that we have had brought against us and possibly confusion which has existed between Koke and Coca-Cola."

JAMES L. WRIGHT, of New Orleans, once president and secretary of the Southern Koke Company, Ltd., testified:

1510 "I was connected with the Southern Koke Company, Limited of New Orleans. Mr. Moore came to New Orleans in the latter part of 1911. Moore was formally installed as president, I as vice president, and Mr. Scott as secretary-treasurer. I have a total of twenty-five hundred shares of stock in my name. I later became president of the Koke Company.
1514 * * * My understanding of the adoption of the word Koke was that there were frequent demands, or calls rather on the part of buyers of the various soft drinks for Koke and Dope, and similar terms, and that the word Koke was adopted to take advantage of that demand.

That was my understanding of the adoption of the word, I was told that the word Koke had been copyrighted by a manufacturer of a similar soft drink in Tennessee or Kentucky, up there somewhere, and this copyright on the name was purchased by Mr.
1515 Mayfield or his associates. I believe I am a defendant in this case."

JOHN CAIN (Rec., 622), testified that he was salesman for the Southern Koke Company of New Orleans, about April, 1913, calling on barrooms, grocers and confectioners. He was instructed by Mr. Scott how to approach the trade:

"Mr. Scott instructed me to go out and sell the stuff—sell the 'Koke' on these instructions—I could go out and sell the 'Koke' the same as I could 'Coca-Cola'; and he gave me the formula or affidavit, that the formula was the same as the 'Coca-Cola,' and tell them it was the same as 'Coca-Cola,' and for me to go out and sell it and tell the trade that they could sell the 'Koke' the same as if it were 'Coca-Cola.' He told me there was very little difference in the label—the only difference being that 'Southern Koke Company' was on one and the other had 'Coca-Cola' on it—the labels was the same—you couldn't tell the difference except by close inspection. * * * I sold 'Koke,' I guess. about two months. * * * I told them they could sell it and the trade wouldn't know the difference whether it was 'Koke' or 'Coca-Cola.' * * * To go back over the story: Yes, sir; I told those men Mr. Scott employed me as a salesman and told me to go out and sell it to the trade as 'Coca-Cola.' Yes, sir; that it was like 'Coca-Cola' in taste, that it was made by the same formula. Yes, sir; that the label was the same, and that nobody could tell the difference only by close inspection. * * * I told him I was selling 'Koke,' that it was made out of the same formula, but that it was to be sold for 'Coca-Cola' and couldn't be told from it."

C. H. WHITTLE (Rec., 634), a former salesman of the Southern Koke Company, Ltd., of New Orleans, testified:

"I went out soliciting orders for Mr. Scott. I received instructions from Mr. Scott as to how to solicit orders. He came to me one day and asked

would I go out and help Mr. Cheevers in getting cus-
635 tomers for his 'Koke,' when they had the bottling department going, and I went out with Mr. Cheevers and got from thirty to forty one day, and the next day I got quite a number of customers for him, I don't know exactly. Well, I used a great many arguments to the trade in selling 'Koke'; one I used was that the Coca-Cola people had put up money for prohibition—a million dollars, so I was told by Mr. Scott—and several other things. He told me that the Koke people was the originators of 'Coca-Cola,' and a man by the name of Pemberton, he died and they beat his wife out of it in the courts; that's what Mr. Scott told me. You ask what arguments I used to the trade to sell it; well, when I sold 'Koke' I told them it was 'Coca-Cola'—just the same, not a bit different; they couldn't tell it by taking a bottle of each and drinking it. * * * I sold it as 'Coca-Cola,' not as 'Koke,' no sir,—not all the time, at times when people asked me for 'Coca-Cola' I told them to take 'Koke'; if they asked me was it 'Coca-Cola,' I told them yes. * * * I was bartender in that saloon at that time. No, sir, I did not sell it to my customers as 'Coca-Cola.' I sold it as 'Koke' and as 'Coca-Cola,' and sold it when people came in
636 and asked for 'Coca-Cola' I would give them 'Koke.' * * * When Scott sent me out he didn't exactly tell me to sell it as 'Coca-Cola,' but he told me to say anything so I sold it. As long as I sold it he didn't care. He put it in pretty near that exact language. He told me he didn't care how I sold it, so I sold it. You ask won't I swear one way or the other—did Mr. Scott tell me to sell that stuff as 'Coca-Cola'; he told me to sell it any way I felt like selling it, as long as I sold it. You again ask me if Mr. Scott told me to sell that stuff as 'Coca-Cola'; he told me to sell it any way I could sell it—it didn't make no difference to him how I sold it, so I sold it. You ask me for the third time if Mr. Scott told me to sell that stuff as 'Coca-Cola'; he didn't make any exact assertion

on it at times; at certain times he did. He told me plump and plain to say it was 'Coca-Cola' if I could sell it that way. Yes, as 'Koke' and as 'Coca-Cola,' if I could sell it that way. You again ask me if I am certain that Mr. Scott told me to sell 'Koke' to the dealers as 'Coca-Cola'; I answer, yes."

W. J. CHEEVERS (Rec., 588), connected with the Southern Koke Company, Ltd., of New Orleans, from October, 1912, until three weeks after the death of Mr. Scott, which was May 29, 1913:

"Mr. Scott was vice president and general manager. I was a member of the board of directors. * * * You ask if I ever had any discussion with Mr. Scott in regard to 'Coca-Cola' and 'Koke'; well, we had innumerable discussions. I can't say just right off, any particular one, but we had so many—for instance, there was one where I spoke to him about the unfairness of the business that he was going into and his wife tried to dissuade him from going into it. I asked him if he didn't think it was unfair to be trading on the advertisements and money spent by another concern, and he said he did; that he got into the thing over in Texas, wherever he had met those folks, the Koke Company of America—and they had taken him around, he had been at different soda fountains, and he found whenever a man wanted 'Coca-Cola' he would invariably ask for 'koke' and he saw the value of that as a chance to make money. When I first started out as a city salesman, Mr. Scott furnished me with an affidavit signed by Mrs. Pemberton—she was the widow, I believe, of the original owner of 'Coca-Cola'—in which she stated that Mr. Mayfield was familiar with and knew the original formula of 'Coca-Cola' and was qualified, in her opinion, to manufacture it—something to that effect—if you have one here I will identify it. Mr. Scott told me the only difference between 'Coca-Cola' and 'Koke' is a slight percent-

age of celery, which was added to cover the patent or copyright laws. Yes, sir; I am familiar with the time that they first commenced bottling the product that they called 'Koke.' This bottle was not labeled. I told Mr. Scott that the bartenders generally,—the trade generally—they were complaining about the bottle not being labeled because there was not similarity between that and the Coca-Cola bottles; Mr. Scott said he would order labels and asked me if I would go with him to Houser's printing office—the legal printers. I went with him and we met Mr. Speyer there. Mr. Scott had the cuts, I suppose there were about a dozen, and he told him he wanted him to make him up 50,000 labels like that—said that he wanted them about the color of the 'Coca-Cola' label. A question arose about the color of the background, whether it was purple or black. My idea was that the inset,—the 'Coca-Cola' inset,—was red, always, for some reason or other. I said that to Mr. Scott. He said, "Well, you get a bottle from the corner; buy a bottle of "Coca-Cola" and bring over here and we will see.' So I brought it back and Mr. Speyer and Mr. Scott and all agreed that the color of the 'Coca-Cola' label was a dark purple
591 or a dark blue—anyhow they agreed on the color, that was the color that he wanted, and he told him to make him up 50,000, I think, to simulate the 'Coca-Cola' color. Yes, sir; those labels were delivered. Plaintiff's Exhibit No. 105 is the label referred to. * * * You ask if I was ever in there when they had any 'Coca-Cola'; when they made up the first batch of 'Koke.' Young Mayfield had a bottle of 'Coca-Cola' syrup. The following day—I think it was the next day—Mr. Scott mixed some of this 'Coca-Cola' syrup—the 'Koke' wasn't then ready, and we had it to drink; and I asked him the purpose of having the 'Coca-Cola' syrup and asked him why he had sent out and purchased 'Coca-Cola' syrup. Young Mr. Mayfield said it was for the purpose of testing, and I presumed that was to get the weight

and the body and the color to make comparisons be-
302 tween 'Coca-Cola' and 'Koke.' * * * Then came the discussion of making the label. I mentioned that the trade, the bartenders, complained that there was no label; that they wanted a label so it would look similar to 'Coca-Cola' packages; that was the object; that's what they were working for. * * *
304 XQ. 218. The object of the testimony you are giving, as you understand it, is to show that in your presence Scott and Speyer—the printer of Houser—had in their hands a bottle of 'Coca-Cola,' with this label, and that they were trying to get, in type and in color and in shape, a label as near as possible to the 'Coca-Cola' label; is that what you are trying to tell us? A. That's Mr. Scott's orders, to get it as
305 near like the 'Coca-Cola' label as possible. * * * I told the bartenders whom I saw anything to effect a sale. Mr. Scott was frequently with me when I effected a sale. No, sir; I did not tell them it was 'Coca-Cola.' My first argument was to patronize home industry, that this was bottled here. Sometimes they would say, 'Well, you know the folks want what they call for; they want "Coca-Cola," and we can't put that across.' I told them then that the label was the same and that the product was the same; that it was made by Mr. Mayfield and I showed them this affidavit of Mr. Pemberton that I had, showing that he could make the same syrup the Coca-Cola Company makes. You ask if I then suggested to the barkeepers that they could sell it; that was up
307 to themselves. * * * He (Scott) told his wife what I told you a while ago about the soda fountains and the continuous calls for 'Koke'—instead of giving them 'Coca-Cola' they would give them 'Koke'—and all the money that there was in it. * * *
4 Yes, sir, I thought it was honest to take this stuff to the barkeepers, and tell them what I have been telling you, namely, that the stuff tasted like 'Coca-Cola,' was as good as 'Coca-Cola'; that there was no label on the bottle—I showed them that the label

looked like the 'Coca-Cola'—also the thing on top and also that the bottle looked like 'Coca-Cola.' You ask if, having shown them all those things and having led the horse up to the water, I didn't ask them to drink. Oh, you bet your life they always drank and Mr. Scott was right there when I ad-
615 vanced my argument. * * * Mr. Scott wanted me to go on the road in the very beginning and I absolutely refused, and the only way he ever got me to go out and sell 'Koke' was by telling me of the ill treatment,—he told me the way they worked on the conscience of everybody they wanted to work—that Mayfield had been robbed by the people who finally purchased the 'Coca-Cola,' and this was doing no wrong to people who had robbed somebody else."

WILLIAM J. SPEYER, superintendent and vice president of the Houser Printing Company of New Orleans, testified:

639 "Yes, sir, I recollect an interview I had in 1913 with Mr. Scott and a Mr. Cheevers, representing the Southern Koke Company of New Orleans. Mr. Scott came in and asked about having some cuts made or having some labels made, and I didn't have the cuts present here, and, about two days afterwards, they brought the cuts in with Mr. Cheevers and they wanted the colors of ink, something similar to the colors used on 'Coca-Cola' bottles; well, I didn't know what that was, and Mr. Cheevers went out and brought a bottle for me to see the color of the ink. I used a color of ink as near as possible to that—a kind of blue black. Yes, sir; Mr. Cheevers went out and got a bottle from the saloon and brought it back."[1]

[1]The order for these labels and an impression of the cut were identified by this witness and are in evidence Exhibits 106-110.

M. D. PALMER (Rec., 577), a representative of the Sherwin-Williams Company, of New Orleans, in the paint and varnish business, testified:

577 "I went to the Southern Koke Company's place of business on Howard street near Carondelet and I saw Mr. Scott, who was manager then of the Southern Koke Company. I spoke to him in regard to buying paint and he referred me to the gentleman in the back, who had charge of the painting of the barrels. I went back to see if I could secure some business from him and sold him five gallons of paint. Plaintiff's Exhibit No. 104 is a paper which shows that he bought five gallons of red paint. My company shipped this paint to the Southern Koke Company, which concern used one gallon of it and shipped the other four gallons back. I went around to see what the trouble was and it seems that the paint was 578 not the exact shade he wanted. He thought after it went on barrels it would come out a better shade than it did. He just wanted to know if he could get a red as near the 'Coca-Cola Red' as possible. About that time I went to see Mr. Freeman of the Louisiana Coca-Cola people and asked him in regard to the paint they were using and he advised me not to have any dealing with them whatsoever in regard to getting paint as near that shade as possible, that they had a patent on it and their paint was known as the 'Coca-Cola Red.' After that I had no further dealings with the Southern Koke Company."

A. B. FREEMAN (Rec., 641), of New Orleans, Secretary and Treasurer of The Louisiana Coca-Cola Bottling Company, testified:

641 "I had a conversation in regard to the paint used on 'Coca-Cola' barrels with Mr. Palmer. He came to my office—I had known him for sometime—and asked me if I could find out, or would find out, for him the exact kind of paint used by the Coca-Cola

Company for painting its barrels. I told him I would gladly do so, and he volunteered the information that he wanted to get it for a new concern just starting up in town and putting out a syrup—the Koke Company—who wanted to paint their barrels identically the same color, and would use that paint if he could get it. I told him I would get the information for him, but that I was afraid he couldn't use it, and I showed him one of the printed deci-
642 sions in the 'Gay-Ola' case that I happened to have in my desk. He thanked me for the information and said he would go on away."

FRANK P. KILLILEA (Rec., 678), of New Orleans, in the cooperage business:

678 "In the course of my business I have had talks with the Southern Koke Company but have never sold them any barrels. It must have been about sixteen or eighteen months ago, now—people representing these people came out to our place to buy these 'Coca-Cola' barrels and said that they only wanted to buy 'Coca-Cola' barrels and said they didn't want to buy any other barrels except 'Coca-Cola' barrels, half barrels or kegs. I went and told Mr. Freeman about it. * * * They said they had to have fresh barrels, didn't need to scrap them or anything else of the kind. They wanted me to pick them up and bring them to them every day that I could get them. * * * After looking over the matter, I decided not to sell them."[1]

[1]See Exhibit 154, card of Koke Co. of Texas offering to buy old Coca-Cola barrels.

WILLIAM G. MANSFIELD, of Chicago, testified (Rec., 859), that he recalled answering advertisement in The Chicago Tribune,[2] about April a year ago. He received an answer from Mr. E. M. Boyd and called on him at the Palmer House:

859 "Mr. Boyd[1] told me that he had a formula exactly the same as that of 'Coca-Cola.' He told me he was selling eight per cent. cumulative preferred stock at par and was giving a bonus of common stock to
860 the druggists who dealt in his 'Koke,' which was a product manufactured by the Western Koke Company, which concern Mr. Boyd was representing. I then told him I thought there would be quite a good deal of competition on account of his formula being the same as 'Coca-Cola'; but he argued that there would not, as he would not have to do any advertising and when a person comes into the drug store and asked for 'Coca-Cola' the druggist will give him 'Koke,' the customer not knowing the difference.
861 * * * Yes, sir; it surely is a fact that Mr. Boyd told me that druggists and dealers could sell this when people asked for 'Koke,' that the name of this product was 'Koke' and that when people asked for 'Koke' they could sell it as such. He told me that when a person came in and asked for 'Koke' after they got used to the name, of course, they would use it and sell it as such, and, also, 'Coca-Cola' when a customer came in. Yes, sir; I am certain he said that they could sell it when people asked for 'Coca-
862 Cola.' * * * You ask how it happened that Mr. Boyd unfolded to me this fraudulent scheme—me, an utter stranger; he was almost sure I would invest money in it."

---

[2]The advertisement is in evidence as Exhibit 167.

[1]This is the same Boyd referred to in the testimony of the witness Thomas (*ante*, 92). These statements are not denied. Respondents gave notice that they would take Boyd's testimony but did not do so.

H. G. McLEAN, Dallas, Texas, advertising solicitor for the Dallas News (Rec., 729):

730 "I called on the Koke Company of Texas to solicit an advertisement. * * * I met Mr. Van Winkle and at that time it was my intention to solicit him for a card for the jobbers and manufacturers' trade and we discussed advertising for a few minutes and Mr. Van Winkle told me that the Koke Company of Texas was not doing any advertising. He said they couldn't afford to advertise from the fact that they were selling, I believe he said, 'Koke'—I don't know if he mentioned the brand or not, it seems to me like it was 'Koke,' it may have been some other name—but that it was the same formula as 'Coca-Cola' and said that the 'Coca-Cola' people were advertising and it was generally known as 'Koke'; that is a large percentage of people would call for 'coke' and if the fountains were supplied with 'Koke' they could furnish him with this product and sell it or distribute it in that way. I believe that was the main reason. I didn't have any argument to offset that, consequently I never called on him any more."

GEORGE H. WILKINS (Rec., 863):

866 "I asked Mr. Mayfield if they were doing any advertising, and he said, 'No, I have spent several fortunes in advertising and now I am going to retrench. I am not going to do any advertising for "Koke." "Coca-Cola" has spent millions in advertising and every dollar they spend helps "Koke."' I asked him how that was, and he said that lots of people asked for 'coke' when they meant 'Coca-Cola' but they could not help that; that the 'Coca-Cola' also sold their product as 'Koke' but that he would stop that later and that his bottle and label was the same as 'Coca-Cola' and lots of people thought it was 'Coca-Cola.' * * * I got into conversation with
871 Mr. Nason and, among other things, asked him how he was selling 'Koke.' He said, 'Well, lots of peo-

ple ask for "coke" when they mean "Coca-Cola" and they do not know there is any such drink as "K-O-K-E." Of course, we can't stop that; if they want to do that we can't help it. We sell this product as "Koke," and, if they want to substitute it, that is their business.' I then asked him why there was such a demand for 'Koke.' He said, 'Well, lots of people ask for "Coca-Cola" as "coke" and "dope" and other names.' He said some other names, but I did not pay much attention. Mr. Nason was a salesman. * * * I called on J. H. Van
880 Deusen. I asked Mr. Van Deusen if it was not a fact that people asked for 'coke' when they wanted and meant 'Coca-Cola.' He said, yes, but then you couldn't help taking advantage of people when they didn't know any more than that."

SCHEDULE VIII.

The Fiction of the Use of the Word Koke Since 1888 by Respondents and Their Predecessor Mayfield.

On November 28, 1911, J. C. Mayfield, on behalf of respondent the Koke Company of America, purchased from Christy & Huggins, doing business as the Murfreesboro Bottling Works, registration No. 55878, in the Patent Office, consisting of the word Koke in script. This was later put in interference with an application of W. L. Bitting of Sherman, Texas, to register the word Koke in block type and Mayfield, on behalf of the Koke Company of America, bought Bitting's application which matured into registration Number 94869, paying a substantial sum in each instance. No business or good will was taken over in either case.

It is probable that at this time Mayfield had not thought of swearing back his use of Koke to 1888 because if he had, it is unlikely that he would have bought these registrations. His true purpose in buying them is characterized by the District Court:

"I further find that the purchase of the trademark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible."

That it was sometime after the pretended purchase of the Murfreesboro mark (November, 1911) that the present claim of priority was evolved, is clear from the fact that the contract between the Koke Company of America and the Southern Koke Company, Ltd. (Exhibit 174) recites Mayfield's source of title, not as one by adoption and use of the word Koke from 1888, but as derived only by purchase from the Murfreesboro Bottling Works and in his correspondence with Christy & Huggins concerning the Bitting interference, when the question of priority of the use of the word Koke was vital, Mayfield makes no mention of any prior use by him. (See Rebuttal Exhibits 92-100.) Indeed in Exhibit 100 Mayfield, on March 3, 1913, in writing to Christy & Huggins says (referring to Bitting's claimed date of use of 1898), "This party claimed priority to right so I understand." If Mayfield had used the word Koke since 1888, as he later asserted, it is inconceivable that in preparing for that interference he would not have mentioned it to his associates.

That Mayfield's scheme of purloining the good will of the Coca-Cola Company was conceived before 1909, when he was manufacturing and selling only Celery-Cola, is shown by Murphy's testimony (Rec., 1277, 1283, 1284, 1289), and the incident related by Mr. Candler (Rec., 385), from which it seems that Mayfield was substituting a drink called Yum Yum for Coca-Cola as far back as 1893.

His piratical intention is evidenced by the certificate alleged to have been given to Mayfield by Mrs.

Pemberton. This document, dated August 1, 1899, contains the following statement:

"To my personal knowledge Mr. Mayfield was an expert in the manufacture of both the above commodities long before the present Coca-Cola and Wine Coca Companies were formed, and he has been at the head of the manufacturing department of one or the other of these companies ever since their organization."

This certificate contains a statement which Mayfield has never had the hardihood to contend is the truth. In fact, Mayfield admits its falsity. (Rec., 2426.)

He never had any connection directly or indirectly with the Coca-Cola Company and was never at the head of the manufacturing department or had anything to do with it. He does not assert that he ever was.

The "dear Judge letter" is further evidence that he did not know the formula and was trying in every way to find out how to make Coca-Cola. This document (the writing of which Mayfield admits) is printed in full later.

It is further shown in one of the Pogue letters, admittedly written by Mayfield in 1905 (Rebuttal Exhibit No. 28), that Celery Cola was habitually and to Mayfield's knowledge substituted for Coca-Cola. He says:

"The druggists there would buy anything just as quick as they would 'Celery-Cola,' for they substitute for Coca-Cola anyway largely."

The Coca-Cola Company contends and the District Court expressly and the Circuit Court of Appeals, inferentially found that there never was any use

whatever of the word Koke by Mayfield until June 1, 1909. There can be no doubt of the correctness of this conclusion. We have Mayfield's positive statement in State *v.* Rice that he was not using it in 1907. On December 15, 1905, he wrote to Pogue "Celery-Cola is my all." (Rebuttal, Exhibit 12.) We have his statements six times repeated in his affidavits for state registration that the first use was June 1, 1909. (Rebuttal Exhibits 84, 85, 86, 87, 88, 89.) We have the fact of his purchase of the Murfreesboro and Bitting marks for substantial considerations, which is wholly inconsistent with the idea of superior title or prior right in Mayfield. We have the source of the title of Mayfield in the contract between the Koke Company of America and the Southern Koke Company, Ltd., alleged to be based on this purchase and not on any prior use.

Against these facts is the inherently incredible story of Mayfield and his co-swearers, disbelieved by the lower courts, unsupported by anything of a tangible character, coupled with Mayfield's proved perjury, and his successful impeachment as a witness.

Comments on the Testimony of J. C. Mayfield.

It is plain from a perusal of Mayfield's testimony in this case and a comparison of it with the testimony that he gave in State *v.* Rice in 1907 (Rebuttal Exhibits 4 and 5), and in view of the repeated declarations he made under oath in connection with the registration of the name Koke in the various states (Rebuttal Exhibits 84-89), that Mayfield's story that he used the name Koke before 1909 is pure invention.

The following are parallels of a few of Mayfield's most glaring contradictions which we believe demonstrate him to be a deliberate falsifier.

J. C. Mayfield, testifying in this case in New Orleans on March 10, 1915, said (Rec., 1683):

"Q. 1328. Do you know of a Mr. Rice of Memphis, Tennessee?

A. I have heard of him.

Q. 1329. Do you know him?

A. Yes, sir.

Q. 1330. Did he work for you?

A. Yes, for a while.

Q. 1331. Was not there some claim that he took your formula away with him?

A. Yes, sir.

Q. 1332. Was he prosecuted for that?

A. Yes, sir.

Q. 1333. He started that with your formula?

A. I do not know.

Q. 1334. But he was prosecuted?

A. I do not know, only about the case.

Q. 1335. *You were not there at the hearing?*

A. *No, sir.*

Mayfield's attention was called to this statement, and he was confronted with a transcript of his testimony in *State* v. *Rice*, at Chattanooga on July 5, 1915, and he was asked (Rec., 2409):

You testified to that effect at New Orleans, did you not?

A. *If I said, no, sir, it was a mistake. I said, yes, sir.*

Q. 5. This is your testimony, taken at New Orleans, reported by the Commissioner on behalf of the defendants?

A. I don't know about the typographical work there; I was there, of course.

Q. 6. *You say that is a typographical error.*

A. *A typographical error.*

Q. 7. *And that you did not say, "No, Sir"; you said yes, sir?*

A. *I said, yes, sir.*

Q. 8. And that Mr. Fain, the Commissioner, appointed on behalf of the defendants, made a mistake; is that it?

A. They must have made it; it is a mistake.

Q. 9. You were there?

A. I was there; yes, sir.

Q. 10. Did you testify in that Rice case?

A. I did.

Q. 11. You were sworn in that case, were you not?

A. I suppose so.

The record itself demonstrates that the "typographical error" is fiction. If the witness had stated that he was present at the hearing, of course, the next question would have been "did you not testify in that case." The subject certainly would not have been dropped.

It is not surprising that Mayfield hoped to conceal his connection with State *v.* Rice. He was present at the trial and testified. His testimony there (a transcript of which is in evidence as Rebuttal Exhibits 4 and 5) is utterly at variance with the claims made by him in this case. After this transcript was offered and in response to repeated requests of counsel for The Coca-Cola Company, Mayfield was put

back on the stand and attempted to explain the discrepancies between his two sworn statements. He admitted the correctness of the transcript of his testimony in State *v.* Rice and then naively stated that he "evaded in a way," as he calls it, the questions put to him in the course of that trial and attempted to explain how he came to do it. Instead of helping matters he succeeded, by his attempted explanations, in making the contradictions only the more apparent, for his "explanations" contradict not only his own previous testimony, but that of his son, S. T. Mayfield, and of many of the witnesses who had sworn in his behalf. For example:

Mayfield testified here, in March, 1915, that he got the Coca-Cola formula from Dr. Pemberton in 1888.

In 1899 he wrote the "Dear Judge" letter, in which he states that he got what he knew of it from a negro that worked for The Coca-Cola Company and certain things from Brooks, the old Coca-Cola drummer.

He testified in State *v.* Rice, in 1907, that he did not have the Coca-Cola formula and did not claim it, but that The Coca-Cola Company bought it from Pemberton.

He then attempts, in July, 1915, to explain his testimony in State *v.* Rice, by swearing that his wife was in the court room while he was testifying, that she had been trying to get the Coca-Cola formula from him and that he "evaded" when he said that he did not have it, forgetting apparently that he had testified in March, 1915, in this case, that his wife knew the Koke formula, which he claims is the same as the Coca-Cola formula, and that his son, S. T. Mayfield, had testified that his mother, the same woman from whom Mayfield says he was trying in 1907 to conceal the Koke formula, was making Koke in 1895 or 1896 with a man named John McCowan.

This series of contradictions is so ludicrous and seems so incredible that the actual testimony is here paralleled so that the court can see for itself what a mess this man has got himself into. The italics are ours.

COLUMN 1.

Mayfield's testimony in this case at New Orleans, March 10, 1915 (Rec., 1608):

Q. 49. Now, was the formula for making Coca-Cola made known by Dr. Pemberton to the members of that partnership at that time?

A. It was to me.

Q. 50. Now, explain, did he just tell you what the formula was, or how was that, how did he make it known to you?

A. He got his formula book and called it over to me word for word before we left the Marietta Street place, before the contract—oh, well, anyhow, it might have been after, but he was in bed sick and we thought we ought to have it, you know; we were looking after things and we had paid in our money and I think he sent for me and I went up to his sick bed and he had the formula book and I brought me a book and I copied everything word for word as he give it out, with complete instructions.

Q. 51. What—*was the formula for Coca-Cola copied by you at that time?*

A. *It was.*

Q. 52. What became of that book, Mr. Mayfield?

A. I do not know what ever did become of it, that book. It may have been I was—I reckon it was a little book, anyhow, I had copies of it, complete copies either on a book or paper.

* * * *

COLUMN 2.

Extracts from Mayfield testimony in *State* v. *Rice*, at Birmingham, Ala., in 1907. (Rebuttal Ex. 4, 5, pp. 51, 52.)

Parker House, Boston,
June 18, 1899.

My Dear Judge:

I have just completed my experimenting with coca extract. I have perfected everything. Now, listen, our original formula called for just twice the amount of coca extract that we are now using. I kept cutting it down to make the flavor more pleasant. It did not call for glycerine. I put that in to eliminate the bitter from the coca extract. *I got that from the negro that worked for Coca-Cola Company.* The Coca-Cola Company extracted the leaves so they could hold up the quantity of extract, I now have. I read an article from a German chemist and *Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta.* You do know that it is the coca extract and caffeine that does the work. All the trade who have been cutting the goods, that is, mixing simple syrup with it, say wine coca would not stand as much. It will now. So I will show you just how to use the glycerine with the leaves while I am with you Sunday and Monday. I want you to use two and a half gallons of the extract you are now making instead of 1 1-4. Measure out the 2 1-2 gallons extract, put it in a 5-gallon keg and put 2 gal-

COLUMN 3.

Mayfield's attempted explanation at Chattanooga, July 15, 1915 (Rec., 1191):

I was in hopes we would get through with this lawsuit without dragging through the graveyard, disturbing the dead, and I so far have evaded it, but since you brought up that letter I have to explain. This dear Judge was the husband of my first wife. I will state, however, that she secured a divorce from me in Atlanta, legally. The court gave me the children, and I did the best I could to raise them and educate them and bring them up. My wife was demented. All our family physicians told me so, but at times she had lucinal intervals, and at those times she was very grasping, making money, and the fact that I bought out the Coca-Cola business while she was my wife she thought she was entitled to a part of the Coca-Cola formula, notwithstanding the fact that she made with her attorney a final settlement that was satisfactory. *This letter was written several years after our divorce. She demanded of me a copy of that formula.* I put her off with one excuse after another. At this time my son and I had a little business in Jersey City. She went to his place of business—I had no objection—because the son was her son. I was over there once or twice and *she realized the value of the Coca-Cola formula—or Coke formula, which was the same,* and that if she could get a certificate from me she would be able to make considerable money by selling this formula. I put her off with one excuse after another, that I had misplaced the formula—lost it, here, yonder or some place else—and that I

COLUMN 4.

Mayfield testified in New Orleans in this case on March 10, 1915 (Rec., 1679):

"Q. 1298. I want to ask you if your first wife became Mrs. Diva Brown afterwards?

A. Yes, sir.

Q. 1299. And Mrs. Diva Brown was around the plant in Atlanta, Georgia, she was Mrs. Mayfield at that time, she was around the plant in Atlanta, Georgia, was she not when you first started to manufacture?

A. No, sir, she was not there in 1888.

Q. 1300. When did she start coming around the plant as I understand?

A. Well, she started when I went back there in 1903.

Q. 1301. 1903?

A. I mean 1893.

Q. 1302. Well, did you go away from Atlanta before 1893?

A. I sent my wife away from there, and children, back to Roanoke, Alabama. My family were only there for a little while, the children in school. It was a cheaper place to live and after she got well they came back.

Q. 1303. In 1893?

A. She was not around the place, nobody ever seen her around there during the first business there, 1888 or 1889.

Q. 1304. Did she help manufacture around the plant at all?

A. *She may have helped a little around with my son and Mr. Bloodworth when we went back there. I think she did, in '93 up to '94 or '5, along there.*

Q. 1305. Was she familiar with this formula that you got from Doctor Pemberton?

A. Well, I could not answer that,

COLUMN 1.

(Rec., 1645):

"Q. 433. You stated, Mr. Mayfield, on your direct examination that *Doctor J. S. Pemberton made known the formula for Koke or Coca-Cola to me*, he got his formula book and called it over to me word for word; when was that?

A. That was *in January*, just after he had signed the contract.

Q. 434. Of what year?

A. Of *1888*.

Q. 435. *That was the Coca-Cola formula?*

A. It was.

Q. 436. *You are sure of that?*

A. *I am.*

Q. 437. *Absolutely?*

A. *Absolutely.*

Q. 438. *No possible mistake about that?*

A. *No, sir.*

Q. 439. Now, you stated that he made it known to you from a book, did you see this book?

A. I did.

Q. 440. Did you read from it?

A. I did.

Q. 441. What was at the top of the page, if anything?

A. Just Coca-Cola formula.

Q. 442. *Just "Coca-Cola formula" was at the top of the page, and he read it off to you?*

A. *He read it off to me and I copied it.*

Q. 443. *You made a copy?*

A. *I made a copy.*

Q. 444. In Doctor Pemberton's presence?

A. Yes, sir.

Q. 445. And with his consent?

A. Sure.

Q. 445. *There is no possible doubt about that?*

A. *No, sir.*"

* * * *

(Rec., 1646):

"Q. 462. And you regarded it, and

COLUMN 2.

lons glycerine with it in same keg, shake it three or four times a day. You can use it in six hours after thus treating it. If the glycerine eliminates the bitter, which it does, you can see how much more effective it can do the work in close contact. It's still better to use a certain per cent with the leaves in mixing them that I will show you. Now change your formula to 2 1-2 gallons instead of 1 1-4; use 2 gallons of glycerine instead of 5, it will not change the cost of the compound nor the flavor one bit, and gives it a more exhilarating drink. Every man in the office here this morning was carried away with the improvement. I will make some flavoring for you Monday so you can see. Have alcohol, leaves, glycerine, Lime C. P. I will go and buy the oils Monday morning. *We have now the original formula and Coca-Cola exactly;* buy 12 lbs. confectionaries and sugar, extra quality, dissolve it with 1 gallon boiling water so I can make some tests Monday. *I will have some 'Coca-Cola' and 'Wine Coca' with me. I am 'tickled to death' at bring able to get back to the original formula and make it identical 'Coca-Cola.'* Have everything ready and we will start operations Saturday morning.

Your friend,

JACK."

The foregoing is a letter Mayfield admitted writing and is a part of the record in *State* v. *Rice*. He testified further (pp. 63, 64):

Q. *You claim to have got the formula from the Coca-Cola people for the wine coca?*

A. *No, sir.*

Q. *Didn't you claim they got it from you?*

COLUMN 3.

would get it. I wrote her and wrote Brown several letters along that line, but so very anxious was she to get it she came to Boston. I do not know, but I believe, when I wrote this letter in question that she was there. I gave it to her. She came there for it. As I said before, she was demented. *I wrote that letter, and I wanted to make it ring with a genuine ring*, so that she and Judge Brown, who was her lawyer—her husband, he was a lawyer of course, he was a judge,—and she went back satisfied with that letter. I had put her off, as before stated, with other excuses. I promised in that letter to be in Jersey City, or New York, on Monday. I was not there, and did not go. If I had gone, and given her a copy of my formula, and taught her and Brown how to make Koke,—Coca-Cola,—this letter and Mrs. Brown would never have appeared in the Rice case; but I did not go, because it was practically my all. I came on back home. I realized what I was up against—a woman who was demented and determined to have a copy of this formula—and being the mother of my children, naturally I thought and planned every way possible to get around giving her what she wanted without wounding her feelings. About the same time I received a letter from my father, that one of my children was sick, so I left Boston. I did not go to New York, or to Jersey City, nor did I comply with my instructions in that letter. I came to Atlanta, and then to Birmingham, because I did not do what I promised to do, *she appeared in this Rice case, for no other reason in the world except to*

COLUMN 4.

she had opportunities helping around there to get familiar with it, and what a wife would have with a husband's business."

S. T. Mayfield swears (Rec., 1458):

"*My mother and John McCowan made Koke.*"

This was in 1895 or 1896 (Rec., 1458).

COLUMN 1.

Doctor Pemberton regarded that formula, that Coca-Cola formula as a secret formula?

A. Yes, sir."

COLUMN 2.

A. *No, sir.*

Q. *Got it from Pemberton?*

A. *Yes, sir.*

Q. *You claim that the Coca-Cola people got Pemberton's formula and you were entitled to it?*

A. *No, sir; they bought it from Pemberton.*

Q. *You had been claiming all the time that you had the Coca-Cola formula?*

A. *Not the Coca-Cola formula.*

Q. Have you not been advertising that you had the formula for the drink the Coca-Cola people claimed?*

A. I may have said I manufactured the stuff—

Q. Didn't you say that you as a chemist of the J. C. Mayfield Company had years of experience in making Coca-Cola?

A. I manufactured it before they bought it from Pemberton.

Q. And you claim that the present Coca-Cola people bought it from Pemberton after you made it?

(63) A. I made the impression that I was an experienced manufacturer.

Q. And knew how to make it?

A. I was experienced in the making of soda fountain beverages.

Q. *Don't you advertise that you know how to make and do make Coca-Cola?*

A. *I don't make it.* I advertise the letter that Dr. Pemberton's wife gave me that I was once associated with her husband in the manufacture of Coca-Cola.

*The Mrs. Pemberton certificate is no doubt what is referred to. (See Rebuttal Exhibit 10.)

COLUMN 3.

get all she could from me relative to this formula. She had no interest in the case, and she was there, and it was her questions largely that I answered. Of course, she propounded them through the attorney. The attorney did not know anything about all those pills and all those things—she, in a measure, did—that is what she was after. She had possibly a superficial knowledge of the formula, but she wanted facts, the proportional parts, and by being there she hoped to get them. *I evaded in a way a great many of her questions—those which did not apply to the case at issue.* I had the city physician, of Birmingham, Ala., to be present at this trial and he was there. I told him what I had to contend with, and he said he would be present, and he noticed her condition. As before stated, the case at issue had no bearing on a great many of these questions, and as she had demanded a copy of the Coca-Cola formula, or the Koke formula, and *I had told her and Judge Brown that I had lost it, or misplaced it, she was there to get all the information she could. Of course, I had not lost it, and I had not misplaced it,* because I was making Koke in Jersey City at that time from the original Coca-Cola formula—I do not mean I was making Koke in Jersey City, at the time of the Rice trial, I am talking about in Jersey City, *when I wrote this letter,* and she was in Boston, demanding of me a copy of that formula, and a certificate from me that it was the original Coca-Cola formula. I would not give it but evaded her and put her off with the excuse

COLUMN 4.

COLUMN 1.

COLUMN 2.

Q. And knew how to make it before the present Coca-Cola people got the formula?

A. I think she stated that to me.

COLUMN 3.

COLUMN 4.

hat I had lost it in order to get rid
f what I—which was true—a woman
hat was not at herself. I was trying
o protect my property and my
fe. She had threatened my life and
n fact had attempted it two or three
mes.

* * * *

(p. 2426):

A. Well, I hate to explain it, but I
ill. *Mrs. Brown, the mother of my
hildren, was propounding these ques-
ons through the attorney on the other
ide.* I had told her often and often
hat I had lost the Coca-Cola formula,
hich is the Koke formula, you might
ay. She was after all the informa-
ion she could get about the Koke for-
ula or the Coca-Cola formula. *I had
ould piring it to her in every way
ossible.* She stated in some of her
ettlements and things that she
ad the original Coca-Cola formula.
his letter addressed to Judge Brown,
as written eleven years after Dr.
Pemberton's death. If I had given
er the copy of the formula, if I had
one to Jersey City and taught
er how to make it, she would
ot have appeared in this case,
ut not having it, not being able to
ell the formula as she wanted to, she
ppeared in this case and sought all
he information possible, and *that is
hy those questions were asked. I
old them along that line because
hey were immaterial and did not have
ny bearing on the case at issue. As
efore stated, my property was at
take, and that is why I answered
hose questions along there as I did.*
t the time of this trial, April 15,
907, she had not a satisfactory for-
ula. She did, however, after that,

COLUMN 3.

in some manner, get a satisfactory formula, or rather a formula—I do not know that it is a satisfactory formula—but a formula that made a good cola beverage.—I know she got a lot of it in this particular trial, and as Rice had stolen my Celery Cola formula I have reasons to believe that Rice gave her a copy of the celery cola formula.

COLUMN 4.

If, when Mayfield was testifying in State *v.* Rice, his wife knew the formula, as S. T. Mayfield swears she did, Mayfield's excuse for testifying falsely—that he was trying to conceal it from her—is a complete failure. If it be objected that S. T. Mayfield is mistaken and cannot know what his mother knew, it is a simple matter to arrive at the same result by another route.

Concerning the transaction which resulted in the alleged purchase of the Dope trade-mark from Houppert and Worcester of Birmingham, S. T. Mayfield testified that Houppert and Worcester disclosed a formula to him, that this was the formula under which Houppert and Worcester had been making the drink which they sold as Dope, and that this was the same as the Koke formula.

He swears (Rec., 1464):

"Q. 105. Was the formula for making that Dope made known to you at the time of making this purchase?

A. Yes, sir.

Q. 106. How did that formula compare with the formula for making Koke?

A. Well, practically the same thing; it was the

same; there might have been some little minor detail as to some ingredient, but I did not notice it if it was. Of course, I knew the formula for making Koke, and have it in my head and I have had for a long, long time."

The answer to the amended bill in this case contains the following (Rec., 195):

"In about the year 1903, P. L. Houppert and Samuel H. Worcester, of Birmingham, Alabama, partners, doing business under the firm name and style of 'Houppert & Worcester,' having acquired a knowledge of the formula from which respondents' predecessors in title had theretofore manufactured their extract, syrup and beverage known as 'Koke,' began to manufacture, market and sell, in interstate commerce, an extract, syrup, and beverage, which were substantially identical with the extract, syrup and beverage theretofore manufactured and sold under the name of 'Koke,' by respondents' predecessors in title, and substantially identical with that which the respondents are now manufacturing and selling under the name of 'Dope.'"

The witness, Campbell, who was connected with Houppert and Worcester, testified that the Dope formula was obtained by them in 1907 from Mrs. J. C. Mayfield. (Rec., 1373.)

Therefore, since the Koke and Dope formulas are the same and Mrs. J. C. Mayfield in 1907 knew and sold the Dope formula, she must then have known the Koke formula. But Mayfield swears that in 1907 in State *v.* Rice he testified as he did to conceal it from her.

First Use of Koke.

J. C. Mayfield testified in this case at New Orleans on March 10, 1915, that he and the Koke Company of America, as his assignee, have continuously used the word Koke as a trade-mark since 1888, and that it was sold in receptacles labelled or stencilled with the name "Koke" during all that time. (Rec., 1616, 1617.)

In his applications made in September of the year 1910 to register Koke as a trade-mark in various states, the date of the first use of Koke is sworn by Mayfield to have been June 1, 1909.

In his application to register Koke in the State of New York (Rebuttal Exhibit 84) he swore:

"The same has been in use by applicant since June 1, 1909."

In his application to register "Koke" as a trade-mark in Indiana (Rebuttal Exhibit 85) he swore:

"Length of time, if any, during which the trade-mark 'Koke' has been in use—since June 1, 1909."

In his application to register Koke as a trade-mark in Massachusetts (Rebuttal Exhibit 86) he swore:

"Length of time during which the trade-mark has been in use—since June 1, 1909."

In his application to register Koke as a trade-mark in Nebraska (Rebuttal Exhibit 87) he swore:

"The said trade-mark or label has been in use since June 1, 1909, and consists of the arbitrarily selected mark or character herewith illustrated 'Koke' (trade-mark)."

In his application to register Koke as a trade-mark in California (Rebuttal Exhibit 88) he swore:

"This trade-mark consists 'Koke a beverage.' This

trade-mark has been used in its business since the first day of June, 1909."

In his application to register Koke as a trade-mark in Pennsylvania (Rebuttal Exhibit 89) he swore:

"The trade-mark consists of the word 'Koke,' the length of time, if any, during which it has been in use fourteen months." This application is dated Sept. 16, 1910.)

These applications purported to be made by the Koke Company of Shreveport, Louisiana, but Mayfield says (Rec., 1632):

"They were my trade-marks and my business and I just took them out in the name of the company."

Mayfield's explanation is that he was referring to the adoption of a particular barrel label when he made these affidavits, but the applications clearly refer to the word Koke, not to any particular label, and the Pennsylvania affidavit (Rebuttal Exhibit 89) explicitly recites that "The trade-mark consists of the word 'Koke.'"

The same statement occurs in the Massachusetts application (Rebuttal Exhibit 86).

The transfers of these state registrations from the Koke Company, Limited, of Shreveport, back to J. C. Mayfield, all describe the mark, not as a particular label, but "the trade-mark 'Koke.'" (See Defendants' Exhibit 156.)

The date of use given in these applications (June 1, 1909) was not the date of the organization of the Koke Company, Limited, of Shreveport. This corporation Mayfield swears was organized in the fall of 1910 (Rec., 1673), about the time these affidavits were made, so that the date, June 1, 1909, must refer

to Mayfield's individual use and is when he adopted and first began to use the word Koke.

Manufacture of Koke in Birmingham and Nashville.

J. C. Mayfield testified in this case New Orleans on March 10, 1915 Rec., 1665):

"Q. 919. I will get to that, the J. C. ayfield Manufacturing Company was 20th street, this bottling—they re bottling what?

A. They bottled everything I was en introducing, all of my different vors.

Q. 920. They bottle Koke?

A. Koke, Celery Cola, Vigo, Pepsi-la, and all the soda water flavors."

Again he says (Rec., 1685):

"XQ. 1371. You state positively at during the time you were in shville the *J. C. Mayfield Manufac-ring Company manufactured Koke?*

A. *Yes, they manufactured Koke.*"

In *State* v. *Rice* at Birmingham in 1907 he said (Rebuttal Ex. 4, 5, pp. 7, 8, 25, 26):

I am president of the J. C. Mayfield Manufacturing Company. It was organized about five years ago. It is still doing business. They are doing nothing now, except supplying the Celery-Cola Company with their goods. They have contracts with the Celery-Cola Company on their specialties, Celery Cola and Pepsinola.

* * * *

Q. *Mr. Mayfield, what does your company manufacture besides this Celery Cola?*

The state objects to the question.

The Court: Answer the question.

A. *That is all they do.*

Q. Does this Celery Cola Company manufacture anything except Celery Cola?

A. *They do other business, but don't manufacture anything else except these two drinks.*

However, at Chattanooga, on July 5, 1915, Mayfield swears (Rec., 2423), that "Celery-Cola" and "Pepsi-Nola" were the only two things the J. C. Mayfield Manufacturing Company had just at that time; that he individually had the Koke formula, and then in almost the same breath he contradicts himself by saying (Rec., 2431) that "Celery-Cola" and "Pepsi-Nola" were what the Celery-Cola Company manufactured. They had a license from the Mayfield Manufacturing Company to manufacture these two specialties. And again (Rec., 2431) he puts a third version on the situation when he says:

"I manufactured all the stuff, not only 'Celery-Cola' and 'Pepsi-Nola,' and manufactured 'Koke.'"

S. T. Mayfield, on the other hand, swears (Rec.,

1460) that the company manufactured and sold Koke and Celery-Cola and Pepsi-Nola, extracts and syrups.

And again (Rec., 1478) he swears:

"XQ. 440. What did the J. C. Mayfield Manufacturing Company continue to manufacture?

A. They continued to manufacture 'Celery-Cola,' 'Koke' and 'Pepsi-Nola,' just as in Nashville."

J. W. Mayfield says (Rec., 1536) that during the time the J. C. Mayfield Manufacturing Company was doing business there, they were making "Koke" and "Celery-Cola" and Pepsi-Nola."

And again he says (Rec., 1545) that the Celery-Cola Company was operating down there (Birmingham), manufacturing Koke.

The Rebuttal Exhibits 11 and 55, have among them letterheads of the J. C. Mayfield Manufacturing Company, and Celery-Cola Company, which announce "Manufacturers of Mayfield's Extracts."

In short, the truth of the matter is that the J. C. Mayfield Manufacturing Company and the Celery-Cola Company were putting out two drinks, "Celery-Cola" and "Pepsi-Nola." For the purposes of this case Koke has been since added.

There were produced by the Coca-Cola Company in rebuttal a large number of employees of the Celery-Cola Company and J. C. Mayfield Manufacturing Company who testified that they never had heard of any product called Koke being made by either of these companies. A large number of letterheads and advertisements of the Celery-Cola Company and J. C. Mayfield Manufacturing Company were produced by the witness Pogue, an ex-employee of these companies, in response to a *subpoena duces tecum*. None

of these showed the name Koke. Then Mayfield, to get himself out of the hole that he had got himself into, swears that it was not his companies that made Koke, but that he personally made it, forgetting apparently that his two sons had previously testified that the companies had made it.

Reasons for Adopting Koke.

A. O. Murphy (Rec., 1277), testifying first, admits that when he says the word Koke was adopted, it was known as a nickname for Coca-Cola (page 1289):

"I cannot say whether the general public at that time had adopted any nicknames for Coca Cola. I say it is very natural, perhaps one might be used interchangeably with the other—might be nicknamed for the other. * * * We adopted the name Koke because it was the best way out of the emergency that we could see."

This witness' idea of meeting the emergency was to "retain the thing that we had bought," namely, Coca-Cola, "in some other way." In short the name was selected because it would enable them to pirate the Coca-Cola business.

Mayfield, however, swore when he was afterward called (Rec., 1613):

"At that time I had never heard of Koke, we adopted it on account of its being new and a coined word, that is it, that is an easy word, short. It was something new, the others had never heard of it"

Formula.

Mayfield, in July, 1915, says (Rec., 2427):

"Q. 751. Did anybody else know the formula for Celery-Cola?

A. No, sir.

Q. 752. Did anybody else know how to mix the syrups up?"

In explanation he states that there are two formulas, one is a scientific formula, making the extracts, the flavoring. The other is a mixing, a manufacturing formula. (Rec., 2428.)

"Q. 754. Did anybody besides yourself know the mixing formula?

A. Yes, sir; my sons knew the mixing formula, but they did not know the scientific end of it."

Bearing in mind that the scientific end is making the extracts, Mayfield forgot that he had already testified in March, 1915. (Rec., 1660):

"Q. 817. * * * Your son, Mr. Steve Mayfield, remained at Nashville and did some manufacturing, manufactured these extracts, both Koke and Celery-Cola?

A. Yes, sir."

And again he testified (Rec., 1667):

"Q. 994. You made Koke flavoring and Celery-Cola?

A. Yes, sir.

Q. 995. And you are the only one that made that up to the Van Deusen time?

A. Well, my boys made it."

S. T. Mayfield also testified (Rec., 1464):

"Of course I knew the formula for making Koke and have it in my head, and I have had for a long, long time."

In Rebuttal Exhibit 20, Mayfield writes to Pogue saying:

"S. T. Mayfield made Celery-Cola ten years ago. It was he who made my goods in New York while I was on the road. He manufactured C. C. while I was in the oil field."

Advertising of Koke.

Much is said about the extensive advertising by the Koke Companies. Mayfield produces some futurist specimens, which purport to have been issued by the Southern Koke Company and others, though the financial statement in the prospectus of the Southern Koke Company says nothing about any advertising expense. (Exhibit 169.)

It costs money to advertise and either Mayfield is wrong in his testimony or the prospectus is wrong in its facts. Either the Koke Companies were swelling the profits of the concern with a view to selling stock to possible investors or Mayfield's testimony and the samples of advertising he produced were concocted for the purposes of this litigation. The latter is probably the truth, in view of other significant facts.

Mayfield testified (Rec., 1692) that he bought considerable Koke advertising from the Meek and Beach Company.

In rebuttal plaintiff called Ernest Higgin (Rec., 2067) and Henry Hartman (Rec., 2070), both connected with the Meek and Beach Company, who testified that they never at any time furnished any advertising to anybody with the word Koke on it, but they do remember furnishing Celery-Cola advertising.

Mayfield stated to George H. Wilkins (Rec., 866): "I am not going to do any advertising for Koke."

Moore, the salesman of the Koke Company of Texas said to J. M. Penland, President of the Waco Drug Company, whom he was trying to induce to

handle Koke, that the Koke Company was in position to give a lower price than Coca-Cola

"because they were not doing any advertising, that the average person who called for Coca-Cola used the word 'Coke,' and that they would get the benefit of the advertising done by the Coca-Cola Company." (Rec., 1979.)

This is confirmed by the conversation between G. H. McLean, advertising solicitor of the Dallas News and J. G. Van Winkle, secretary of the Koke Company of Texas. McLean called to solicit advertising (Rec., 730):

"I met Mr. Van Winkle and at that time it was my intention to solicit him for a card for the jobbers and manufacturers' trade and we discussed advertising for a few minutes and Mr. Van Winkle told me that the Koke Company of Texas was not doing any advertising. He said they couldn't afford to advertise from the fact that they were selling, I believe he said, 'Koke'—I don't know if he mentioned the brand or not, it seems to me like it was 'Koke,' it may have been some other name—but that it was the same formula as 'Coca-Cola' and said that the 'Coca-Cola' people were advertising and it was generally known as 'Koke'; that is a large percentage of people would call for 'coke,' and if the fountains were supplied with 'Koke' they could furnish him with this product and sell it or distribute it in that way. I believe that was the main reason. I didn't have any argument to offset that, consequently I never called on him any more."

Manufacture of Koke in St. Louis and Nashville.

Mayfield testified (Rec., 1595):

"I went to St. Louis to see if I could not organize a company there. It was a bottling company. * * * Maybe I stayed there until 1900, sometime in 1900.

Then I went from there to Nashville. I was all the time making Celery-Cola and Koke."

M. J. Handley (Rec., 1989) testified that he was president of the Tennessee Carbonating Supply Company, which had a contract with the J. C. Mayfield Manufacturing Company and bought their products, namely, Celery-Cola and Pepsi-Nola, and that he never heard of the J. C. Mayfield Manufacturing Company handling, advertising, selling or disposing of or dispensing in any way of anything under the name of Koke.

The Coca-Cola Company called in rebuttal Norville N. Leaver, who was salesman for Mayfield's St. Louis companies (Rec., 2035), who stated that he was connected with those companies in 1903 and 1904 as city salesman; that the only things they made were Celery-Cola and Pepo-ade and that he had never heard of Koke and never sold any, and John H. Bohne (Rec., 2041), the chemist who worked for the St. Louis concerns during 1903 and 1904 manufacturing all the products they put out. He also never heard of any Koke.

Koke in Birmingham and the Labels Used There.

One of the most curious masses of contradictions that this record, with all its richness in that respect, discloses, is the Birmingham situation. Mayfield and his sons testified that they were making Koke in Birmingham.

According to their statements the Celery-Cola Company did make Koke and did not make Koke—the J. C. Mayfield Company did make Koke and did not

make Koke—that Mayfield personally made Koke—that none of them bottled Koke and that all of them bottled Koke; and that it was all labeled—upon this last they are unanimous.

In rebuttal a large number of ex-employees of Mayfield and his companies were put on the stand by The Coca-Cola Company. They were disinterested men and women of every class of employment, stenographers, bookkeepers, clerks, traveling salesmen, bottlers and draymen, and these people, without exception, testified that they never heard of any product made by Mayfield, the J. C. Mayfield Manufacturing Company or the Celery-Cola Company called or labeled or sold as Koke during this period. They all, however, remember Celery-Cola distinctly.

The names of these witnesses and the pages of the record where their testimony may be found are: S. A. Ellis (1842), L. M. Barclift (1844), D. E. Moody (1881), B. U. Hopper (1891), W. M. Smith (1839), J. T. Ensley (1900), Thomas Dickson (1906), Homer Brewer (1911), Tom Anderson (1913), George E. Anderson (1917), Mack Crawford (1921), Walter Thomas (1922), Miss N. L. Bonham (1924), Will Barrow (1925), John L. Bevell (1930), W. J. Garrett (1984), Melville Rice (1986), and Mrs. Rufus H. Page (2073).

Charles J. Pogue was employed at Birmingham by the J. C. Mayfield Mfg. Co. in 1904 and was with that company and the Celery-Cola Company until the fall of 1906. (Rec., 1858.) This was the time during which Mayfield and his companies claim to have made Koke in large quantities, and it was the

time when the witnesses at Birmingham, who were called on behalf of the Koke Companies, testified that they had purchased Koke in receptacles so marked. Pogue was Mayfield's intimate friend and confidential man. While the testimony of the Koke Companies was being taken at Birmingham, Pogue was engaged in rounding up and interviewing witnesses who would undertake to testify in their behalf in this case that the J. C. Mayfield Mfg. Company and the Celery-Cola Company made and sold a drink labeled Koke in Birmingham. Pogue was subpoenaed by petitioner and put on the stand. He first insisted on making a statement (Rec., 1854), saying:

"I want to make a statement. I was summoned by the Commissioner the last time that they were taking evidence here, to examine some witnesses for the other side to this case, and, being associated with Mr. Mayfield, I naturally talked to some of them, and I don't think it's really fair myself, to the other side, to allow me to testify in this case. I make that as a claim of personal privilege for myself.

* * * * * *

I began work for the J. C. Mayfield Manufacturing Company in the early part of 1904, and I was with that company and with the Celery-Cola Company until the fall of 1906, I guess it was.

* * * * * *

(Rec., 1861.) You ask if, during the entire time I was connected with the J. C. Mayfield Manufacturing Company, the Celery-Cola Company here in Birmingham, or the Celery-Cola Company in Missouri, any or either of these concerns made, manufactured, sold, advertised, handled, dealt in or had any advertising matter for, any product with the name of 'Koke'—'K-o-k-e?' Well, I was out on the road some, as I stated, and I can't answer that question. You ask if they ever made, manufactured, sold,

advertised, or had any labels, containers, barrels, kegs, or anything else with 'K-o-k-e' on it, as far as I know, at any one of the places, or any of the companies, that I have enumerated heretofore; well, of my own knowledge, I refuse to answer that question—I don't—the position I was in—well, I don't want to answer that question."

If there was such a thing as Koke made by Mayfield or his companies at Birmingham, of course Pogue would have known of it. Why did he not want to answer? If he told the truth and said that there was no such thing as Koke, he would convict his friend and associate Mayfield of perjury and also the witnesses whose testimony he himself had procured. If he had said that there was such a thing as Koke he would have perjured himself, which he was unwilling to do, so he refused to answer, which is a perfectly transparent way of saying that Koke was a myth.

It was, therefore, up to Mr. Mayfield to explain the testimony of his former employees who, though they were about the plant all the time, had never heard of Koke and he did it, in entirely characteristic fashion. (Rec., 2453.) He swears that the draymen and the people about the establishment would not be likely to know what was in the bottles because the bottles were placed in cases that were stenciled "Celery-Cola."

It was, he explained, "none of their business. And that is where it impressed upon these negroes that they were handling Celery-Cola; if they left out a bottle, the bottle had Celery-Cola, the case had Celery-Cola, stenciled or printed on the side." "The negroes who washed the bottles had Celery-Cola before them from morning till night and the bottler who

bottled the goods had Celery-Cola before him." The bottles and cases had Celery-Cola on them and "those negroes thought that everything that went into the cases was Celery-Cola." (Rec., 2454.)

In other words, the people who actually handled the bottles could not tell whether they contained Koke or not, but would be likely to think that it was Celery-Cola because the bottles had Celery-Cola on them.

How does this match with the great particularity with which the Birmingham witnesses offered by the Koke Companies testified about "the little white label with 'Koke' on it in black letters"?

R. J. Baker (Rec., 1302, 1304):

"Koke in black letters he had on it, on the bottles, the bottles had labels on them, the shape of those labels was just on a square paper, and had block letters K-O-K-E."

B. P. McGraw (Rec., 1314) testifying about receiving Koke in 1905 and 1906, says that he got printed Koke labels "about as wide as my two fingers."

W. F. Neal testified (Rec., 1329) that Koke had just a plain label with Koke on it, in black letters, in block type.

Mrs. M. L. Edwards testified (Rec., 1337) that the bottles had a label "hardly as wide as my two fingers." A white label with black letters "K-O-K-E."

H. O. Adams (Rec., 1343) testified that the bottles had a label with "Koke" in black block letters.

E. D. Montgomery (Rec., 1357) testified that at Birmingham they had a small square label, with the word "Koke" in large, black block letters.

A. F. Watkins testified (Rec., 1381) that the "Koke" on the labels was in block letters.

John Smith testified (Rec., 1390) that the bottles had a small label with Koke on it.

C. N. Baker testified (Rec., 1408) that he used Koke labels sent to him by Mayfield. The labels were "as broad as your two fingers."

The truth of this mass of contradictions is accidentally and inadvertently let out by Mayfield. A man named Smith was put on the stand in Birmingham in rebuttal. (Rec., 1894.) He met Mayfield on the street and Mayfield said to him:

" 'We are having court up here at the Tutwiler Hotel, I want you to come up there, maybe you can do me some good; We are bottling a drink called "Koke," and I know you have seen the stuff that we bottle, all you have to do is go up there and tell them we have been bottling that stuff.' He handed me a little slip with 'Koke' printed on it."

Providentially the witness preserved the slip and it is in evidence as Exhibit 66. It is illustrated on the opposite page. It will be noticed that it is white, it is about the size that the other witnesses who, no doubt, got these slips in the same way, testified that the Koke labels were. It has "Koke" on it in black block letters. It is about as wide as two fingers.

Even Mayfield did not have the hardihood to go on the stand and identify this slip as one of the labels he used. He said that all his labels were burned up in a fire.

KOKE

the United States District Court for the
trict of Arizona.

The Coca-Cola Company
- Vs -
The Koke Company of America, Et Al.

the United States District Court for the
ern District of Louisiana, Northern Division.

The Coca-Cola Company
- Vs -
Southern Koke Company, Ltd., Et Al.

The Coca-Cola Company
- Vs -
The Koke Company of America

In the United States District Court for the
Northern District of Texas, Dallas Division.

The Coca-Cola Company
- Vs -
The Koke Company of Texas, Et Al.

In the United States District Court for the
Eastern District of Missouri, Eastern Division.

The Coca-Cola Company
- Vs -
J. H. Van Duesen, Et Al.

Opposition No. 1424,

In The United States Patent Office.

Rebuttal
Plaintiff's Exhibit No. 66 offered in
dence at Birmingham Ala. June 1 191 5

Witness W. M. Smith

L. N. Westbrook
Commissioner.

Record Page No. 145

Q. When did you first commence using these formulas, Mr. Mayfield?

A. I commenced in a small way about eighteen years ago.

Q. What formula did you write first?

A. It has been this same Celery-Cola formula.

Q. Celery-Cola eighteen years ago?

A. About that time.

Q. Was it called Celery-Cola then?

A. I think so. I got it out, first cola compound made in an extract form.

* * * * * *

(11) Q. Where did you get this formula from?

A. I, in connection with Dr. Pemberton, originated that formula after months of experience, testing and getting it down.

Q. Experience in what?

A. Experience in testing, making a good many tests.

Q. Had you ever been employed by any of the Cola people in Atlanta or Georgia, anywhere?

(The State objects to the question, and the Court overrules the objection.)

A. Never by the Coca-Cola people.

* * * * * *

Q. That was the first formula, you say, that you made?

A. Yes, sir.

Q. And you made that when?

(12) A. That has been about eighteen years ago.

Q. You and Dr. Pemberton?

A. Yes, sir."

* * * * * *

J. C. Mayfield, in this record, speaking of the Koke formula (Rec., 1646), said:

"We do not use the extract of coca. There is now no form of the coca leaf connected with the drink at all. The cocaine is left out and we added something in lieu thereof, that has practically the same

flavor as the coca leaf. We added Imperial China tea, flavoring extract. That is the only change. Outside of those two changes there is absolutely no change from the formula that Dr. Pemberton handed over to me in January, 1888."

This change was made after the passage of the Food and Drugs Act of 1906 and must have been in 1908 or '9 (Rec., 2436). Mayfield says:

"I have always adhered to the Koke formula until the passage of the Pure Food Law, when I modified it a little bit so as to comply with that law."

It is very evident that if Mayfield got anything from Dr. Pemberton, he got a formula for Celery-Cola, and that Celery-Cola was the only drink of this character that he made, up to the time he got into the difficulty with the Government for violation of the pure food law, in 1908 or 1909. (*U. S.* v. *Mayfield,* 177 Fed., 765.) He states that at that time he made a change in the formula of Koke. (Rec., 2436.) Why should he have made a change in the formula of Koke? The prosecution brought against him concerned Celery-Cola, not Koke. Koke was not involved. The change that Mayfield claims was made, was the change in the Celery-Cola formula, by eliminating the celery, if there ever was any celery in it, and the coca leaves. The name Celery-Cola was abandoned and the product so revised, was, in 1909, christened Koke.

Mayfield himself lets the cat out of the bag, on page 2414 of the Record, where he says:

"The Coca-Cola Company or somebody gave me a black eye with Celery-Cola. It was dragged through the express company, the wholesale company and drug company of New Orleans, *and I put*

the name Koke—I was having these names registered in the states. I was kind of afraid of the Federal law, don't you see?"

Put the name Koke—of course, put the name Koke on his revised Celery-Cola and used it in 1909 for the first time as he swears in his applications for state registrations that he did.

There is no necessity of making any further comparisons or of pointing out the many other contradictions in Mayfield's testimony and of the many discrepancies between his statement and the statements of his co-swearers. If the foregoing is not enough to brand the claim of Mayfield's prior use of the word Koke deliberate fiction nothing can.

If, as seems clear to a demonstration that Mayfield has admitted that there was no use of the word Koke by him or his companies until 1909, no amount of testimony of people who say that they bought it of him or his companies or saw packages labeled Koke by them before 1909 can possibly be true.

That Mayfield's testimony is false and the story that he tells concerning his alleged use of Koke prior to 1909 is fabricated is clear from the foregoing.

The District Judge in his opinion states:

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the de-

fendant, Koke Company of America, and its predecessors did not adopt or make use of the name 'Koke' until the year 1909, and the use of said name by said defendant and its predecessors was not sufficient to create any right to its use as against the plaintiff." *Parker* v. *Stebler,* 177 Fed., 210, 9th Circuit; *The Barbed Wire Patent,* 143 U. S., 275; *Deering* v. *Winona Harvester Works,* 155 U. S., 286.

Judge Sawtelle has held (and Judge Foster came to the same conclusion) that there was no use of the word Koke prior to 1909, and it would seem from an examination of the foregoing comparisons that this conclusion must be reached. Such is the inevitable logic of the facts. The minute Mayfield admits—as he has by his testimony, in *State* v. *Rice* that he was not using the word Koke in 1907, and his repeated declarations under oath, in his applications to register the word Koke in the states, that its first use was in 1909, no amount of testimony of people who say that they bought it of him, or his companies, or saw packages labeled Koke before 1909 can possibly be true.

The rule firmly established in patent cases that proof of prior use of the invention must be certain beyond a reasonable doubt, applies with double force in a case such as this.

W. A. Gaines v. *Rock Springs Distillery Co.,* 226 Fed., 531.
Barbed Wire Patent, 143 U. S., 275, 284.
Telephone Cases, 22 Fed., 309; 25 Fed., 725; 126
Dodge v. *Post,* 76 Fed., 807.

In this case Mayfield is unable to produce a single label, advertisement, price list, billhead, order blank

or any printed or written matter whatsoever bearing the word Koke which dates before 1909. He claims to have manufactured his goods under the name Koke first in Atlanta, then at Birmingham, then in Nashville, then in St. Louis and then in Shreveport.

Mayfield has produced in support of his assertions his three sons, who corroborate his statements, and a number of people connected in some way with him by bonds of interest or friendship, and some other who testify very indefinitely either to purchases of Koke from Mayfield or his companies, or to seeing receptacles labeled Koke at some place occupied by them. None of these witnesses is able to produce a single piece of documentary evidence or a label, bill, letter or anything bearing the name Koke and pretend to testify solely from memory.

It is the rule of all the authorities that oral testimony is not sufficient to discharge the burden of proof imposed on one claiming anticipation.

Deering v. *Winona Harvester Works,* 155 U. S., 286.

The nonproduction of specimens of a product alleged to be made in great quantities is always a suspicious circumstance.

It is quite possible, however, to say that there is no necessity of imputing perjury to some of the people who testify that they saw receptacles labeled Koke about Mayfield's place of business or purchased Koke from him or his companies from time to time. The testimony is unsatisfactory and may properly be ignored, because it attempts to establish

by memory alone, remote facts exciting no particular attention at the time of their occurrence.

With regard, however, to the testimony of J. C. Mayfield and his three sons, the case is different. These men testify unanimously and with great positiveness to a constant, continuous and extensive use of the word Koke as a trade-mark for a beverage from 1888 to the present time. Their testimony is evidently concerted. They profess to rely on memory alone. They produce nothing of documentary character dating before 1909, not a scrap of paper, not a book entry, not a label, not an advertisement, not a letter—nothing on which the word Koke appears in any manner or form.

Everything of the sort, they testified, was lost or had been destroyed. At this same time a man named Pogue was engaged by them in rounding up such witnesses as were willing to swear for them. (Rec., 1862.) He had been an employee of Mayfield's Birmingham establishment. Pogue was served with a *subpoena duces tecum,* issued under an order of the District Court at Birmingham, Alabama. In response to this subpoena he produced more than a hundred letters which had been in his possession all the time, written to him by Mayfield on the stationery of the J. C. Mayfield Manufacturing Company and the Celery-Cola Company during the time when he swore he was selling Koke in great quantities. *In not one of these letters and on not a single letterhead does the word Koke appear.*

Pogue testified (Rec., 1864):

"I haven't any idea in the world how many letters, papers and things I think I have examined. I

imagine it is a hundred or more. I noticed the printed matter on the letters or documents as I was running through. No, sir, the name 'Koke'—'K-o-k-e' did not appear on a single solitary one of them.

* * * * * *

(Page 1876:)

No, sir, there is not a single letter that I have examined that has got the name 'Koke'—'K-o-k-e' on it, or in it. That includes those I have identified for this record and those I have examined here, but which have not been put into this record."

The letters are detailed and intimate, they mention other drinks, but not Koke. The query is pertinent why did not Mayfield produce them—they certainly were in existence, and he must have known of them because he and Pogue were at that very time together, working up the testimony in this case. (A portion of those letters are in evidence as Rebuttal Exhibits 11 to 60.)

These letters throw an interesting sidelight on the character of the man Mayfield and are highly material on his credibility. They are intimate documents, written to his business associate and reveal the man as he is.

In addition, the witness Bevell, who was interviewed by Mayfield, was later called on behalf of The Coca-Cola Company and produced advertising matter and order books used during the period of alleged use of Koke, but the word Koke nowhere appears.

Mayfield and his sons cannot be excused, as can their co-swearers, on the ground of honest mistake.

It is the testimony of J. C. Mayfield which must be scrutinized.

The three sons are simply swearing in corroboration of their father, and if J. C. Mayfield testified falsely, necessarily the sons do.

Attention has already been called to the glaring inconsistencies in their testimony. It is appropriate here to point out that this case is one where there is a peculiar temptation to perjury. The stake is large. The alleged events on which Mayfield's adverse claim is based are remote. Many of the actors in it are dead and with respect to many of the circumstances it would be impossible to contradict any statement Mayfield might choose to make. As Mr. Justice Brown stated in *The Barbed Wire Patent*, 143 U. S., 275:

"The situation opens wide and dangerously the door to perjury and the fabrication of the evidence. * * * One may easily conceive of instances in which to support a case of prior conception of an invention evidence that it would be impossible to meet or discredit might be falsely devised."

In the general situation in this case there is enough of a foundation on which to rear a superstructure of falsehood. Dr. Pemberton concededly was the inventor of Coca-Cola and its first manufacturer, and J. C. Mayfield concededly was at one time associated with him and has been for years in the business of manufacturing proprietary articles, among other things, soft drinks. It is stated in Moore on Facts, Sec. 1055:

"It is probably within the experience of every trial lawyer and of every judge that willing wit-

nesses, and even corrupt ones, unless they are phenomenal falsifiers, have a foundation of fact upon which they build their fabrications, and that their fabrications are apt to consist of distortions of the actual facts. It arises therefore out of the very nature of perjury that it must be confirmed to a certain extent."

It will be noticed that Mayfield's testimony contains in abundance those things which to the experienced man are earmarks of perjury. There is a copiousness of detail concerning circumstances which are incapable of contradiction, but there is a remarkable economy of detail concerning those things which can be investigated and contradicted.

The language of Mr. Justice Grier in *Luco* v. *United States*, 64 U. S., 515, 535, is suggestive:

"Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness whose willingness to oblige his friend exceeds his judgment will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that he 'does not recollect.' "

The most casual examination of the testimony of all the Mayfields shows that there is copiously present this earmark of falsehood. They all testify that Koke was made in large quantities and bore labels

and was sold generally. They can produce no label. They cannot recollect and they cannot name a single customer who ever bought any. "I do not remember" is the invariable answer of all of them when asked to be specific. S. T. Mayfield made this answer one hundred and forty-six times in the course of his cross-examination and the other Mayfields are equally noncommittal. This in itself is enough to discredit their testimony entirely, apart from contradictions to which attention has been called.

It is evident from the record in this case that J. C. Mayfield has endeavored to repeat the performance of which he was guilty in the suit in St. Louis between his company and the Celery-Cola Company.

In that case one of Mayfield's Companies got into litigation over the trade-mark "Celery-Cola." The defense was made that the complainant did not come into equity with clean hands because, it was asserted that the product contained no celery and did contain deleterious ingredients, namely, strychnine and cocaine. Mayfield evidently sought counsel's advice and got it in a letter which may mildly be characterized as an indiscretion.

This letter (Exhibit 13), was transmitted by Mayfield to Pogue in a communication (Exhibit 12) showing that the advice was followed. These letters are here reproduced and are a demonstration that the manufacture of evidence is no novelty with this individual.

SPECIALTY:—PATENTS, TRADE-MARKS, COPYRIGHTS.

F. T. F. JOHNSON,
ATTORNEY-AT-LAW,
McGill Building.

WASHINGTON, D. C., Dec. 13th, 190

J. C. Mayfield, Esq.,
Birmingham, Ala.

Dear Sir;-

Your favor of the 9th. inst., received and contents carefully noted, also the letter of your St. Louis attorney.

It is absolutely necessary that your beverage "CELERY-COLA" should contain both Celery and Cola, and the fact that it contains additional ingredients greatly strengthens your case. Even if your mixture should contain NuxVomica I cannot see that this would affect the case the least. It is true that NuxVomica is a poison, as are all other drugs but it is also true that it is one of the best and most effective ingredients of "tonics" usually prescribed by physicians. The fact that your beverage contain cocaine should not affect your trade-mark rights, but in view of the great howl that is now going around the country concerning beverages and patent medicines, I would advise that any analysis that may have made of your beverage should fail to show the presence of the drug. I would, therefore, advise that you make up a vat of your beverage increasing the quantity of celery and leaving out the cocaine. Then take samples of the beverage from this vat and have them analysed. Attend to this matter yourself, and have one of your employees, whose business it is to bottle the goods take the samples from this tank, so that he can be put on the stand as a witness and testify that the samples were taken from the tank or tanks from which the beverage sold to the trade was taken.

Your testimony must show positively that your beverage contains both celery and cola, and that in addition to these two it contains 15 to 16 other ingredients. It would be well to give the names of four or five of the other ingredients. As I do not know that the ingredients I cannot advise which you should name, but your chemist can probably advise you on this point. It is neither necessary nor advisable to name all of the ingredients, and if the formula is a trade-secret no Court would compel you to divulge it. If, however, any of the ingredients or drugs used in the beverage combine to form a chemical composition i

SPECIALTY: PATENTS, TRADE-MARKS, COPYRIGHTS.

T. F. JOHNSON,
ATTORNEY-AT-LAW.
Adams Building

J.C.Mayfield------2.

WASHINGTON, D.C., ------

name such drugs, and the composition so formed(provided that such composition is not a harmful one). This matter should be gone over very carefully before your testimony is given.

Harvey W.Wiley is the name of the Chemist of the Agricultural Department, and his address is 1814 10th. Street, N.W., Washington, D.C.

The Certificate of Registration that I sent you some time ago will show the date(1898) that Mr.Mayfield commenced to use Mark. However, I herewith inclose a carbon copy of the Statement made by Mr.Mayfield as to the use of the trade-mark.

The trade-mark "Celery-Cola" indicates to the purchaser that the beverage contains, among other ingredients, Celery and Cola, and I am, therefore, of the opinion that any analysis that will show, or rather fail to develope either celery, or cola, or rather both of them, would prove fatal to your case, as the mark would be held to be descriptive, and you would in all probability be thrown out of Court on the grounds that you were deceiving the public. Therefore you must prove beyond doubt that both Celery and cola are present in the beverage and [illegible] to bring out the fact that there are other ingredients in the mixture.

As I have not seen a copy of your bill against the Celery Cola Co. nor a copy of their answer thereto, I am unable to advise you any further than I have above.

I can give my attendance and assistance at the trial on January 3rd at St. Louis, if such is the wish of Mr.Anderson and yourself. If you wish me to go to St.Louis you will please send me an draft sufficient to cover my expenses to and from St.Louis, and my expenses while in that city.

I herewith return the letter from Mr.Anderson to you.

Very truly yours,

T. F. Johnson

N.B. In the meantime I will look up the law covering this case, as directed. T.F.J.

The following is a copy of the body of Exhibit 13:

Washington, D. C., Dec. 13th, 1905

J. C. Mayfield, Esq.,
Birmingham, Ala.

Dear Sir:—

Your favor of the 9th. inst., received and contents carefully noted. Also the letter of your St. Louis attorney.

It is absolutely necessary that your beverage "Celery-Cola" should contain both Celery and Cola, and the fact that it contains additional ingredients greatly strengthens your case. Even if your mixture should contain NuxVomica I cannot see that this would affect the case in the least. It is true that NuxVomica is a poison, as are all other drugs, but it is also true that it is one of the best and most effective ingredients of "tonics" usually prescribed by physicians. The fact that your beverage contain cocaine should not affect your trade-mark rights, but in view of the great howl that is now going around the country concerning beverages and patent medicines, I would advise that any analysis that you may have made of your beverage should fail to show the presence of that drug. I would, therefore, advise that you make up a vat of your beverage increasing the quantity of celery and leaving out the cocaine. Then take samples of the beverage from this vat and have them analysed. Attend to this matter yourself, and have one of your employees, whose business it is to bottle the goods take the samples from this tank, so that he can be put on the stand as a witness and testify that the samples were taken from the tank or tanks from which the beverage sold to the trade was taken.

Your testimony *must show positively* that your beverage contains *both celery and cola, and that in addition to these two it contains* 15 *or* 16 *other ingredients.* It would be well to give the names of four or five of the other ingredients. As I do not know that the ingredients are I cannot advise which

you should name, but your chemist can probably advise you on this point. It is neither necessary nor advisable to name all of the ingredients, and if the formula is a trade-secret no Court would compel you to divulge it. If, however, any of the ingredients or drugs used in the beverage combine to form a chemical composition I would name such drugs and the composition so formed (provided that such composition is not a harmful one). This matter should be gone over very carefully before your testimony is given.

Harvey W. Wiley is the name of the Chemist of the Agricultural Department, and his address is 1314 10th Street, N. W., Washington, D. C.

The Certificate of Registration that I sent you some time ago will show the date (1893) that Mr. Mayfield commenced to the use Mark. However, I herewith inclose a carbon copy of the Statement made by Mr. Mayfield as to the use of the trade-mark.

The trade-mark "Celery-Cola" indicates to the purchaser that the beverage contains, among other ingredients, Celery and Cola, and I am, therefore, of the opinion that any analysis that will show, or rather fail to develope either celery, or cola, or rather both of them, would prove fatal to your case, as the mark would be held to be deceptive, and you would in all probability be thrown out of Court on the grounds that you were deceiving the public. Therefore you must prove beyond doubt that both Celery and cola are present in the beverage, and in so doing do not fail to bring out the fact that there are other ingredients in the mixture.

As I have not seen a copy of your bill against the Celery Cola Co. nor a copy of their answer thereto, I am unable to advise you any further than I have above.

I can give my attendance and assistance at the trial on January 3rd at St. Louis, if such is the wish of Mr. Anderson and yourself. If you wish me to go to St. Louis you will please send me an amount suffi-

cient to cover my expenses to and from St. Louis, and my expenses while in that city.

I herewith return the letter from Mr. Anderson to you.

Very truly yours,

F. T. F. JOHNSON.

N. B. In the meantime I will look up the law covering this case, as directed. F. T. F. JOHNSON.

(12)

CTS & SODA FOUNTAIN SUPPLIES.

2112 AND 2114 MORRIS AVENUE

BIRMINGHAM, ALA. Dec. 15, 1905.

I am expressing you the box of extracts. The boys made a mistake last time, I personally superintended the shipping of this box. Now if you want anymore expressed [illegible] or any one else, write me and I will get it of promptly.

Enclosed find [illegible] from our atty. in Washington, D. C. (The man that secured our trade mark) I am in favor of having him associated with us. However-it will be a little expensive, but we must win this case, for Coke-Cola is my all.

[illegible] I'm important that we do all we can to win our case. I will write Mr. Johnson this P. M. and keep you posted.

Write me ever, day.

Yours truly,

J. C. Mayfield

Johnson Bottle Co ought to manufacture 3 other things. - We could use Vanilla [illegible] of the "Tea" Coffee. Orange Juice Lime Juice etc.

The Box C. O. shipped today is marked [illegible] so that you may know this is the box you want those Coca Cola Extracts sent for. Ship today - they could find it upon their arrival.

The following is a copy of the body of Exhibit 12:

Birmingham, Ala., Dec. 15, 1905.

Dear Pogue:

I am expressing you the box of extracts. The boys made a mistake last night. I personally superintended the shipping of this box. Now, if you want any more expressed to Baxter or any one else, wire me and I will get it of promptly.

Enclosed find a letter from our atty. in Washington, D. C. (The man that secured the trade mark) I am in favor of having him associated with Mr. Anderson—it will be a little expensive, but we *must* win this case, for Celery-Cola is my all. Confer with Mr. Anderson about this. Show him the letter from Atty. at Washington *at once*. It is important that we do all we can to win our case. I will write Mr. Johnson this P. M., and keep you posted.

Write me every day.

Yours truly,

J. C. MAYFIELD.

Johnson thinks we ought to mention 3 or 4 other things—we could mention Vanilla extract of "Tea" Coffee prune juice Lime juice, etc.

The box C. C. shipped today is marked <P>

So that you may know this is the box you want have your chemist look for *Kola* & *Celery*—they will find 18 ingredients if they could analyze but they are all in small quantities.

This past history is illuminative of Mayfield's disposition and has a distinct bearing on the credibility of his story in this case. In the language of Mr. Justice Blatchford in In re *Goodridge,* Fed. Cas. 5547, p. 614:

"Of course, those who would commit such a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborn by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud."

The demonstrated untruthfulness of Mayfield himself and the highly suspicious character of the testimony of his co-swearers in this case indicate a repetition here of the reprehensible conduct clearly shown to have occurred in other litigation to which he was a party.

In addition to discrediting the guilty parties as individuals and rendering them unworthy of belief, the fabrication by a party to litigation of a cause of action or a defense is the strongest admission by conduct that no real cause of action or defense exists.

As was stated by Lord Cockburn in *Moriarity* v. *London, Chatham & Dover R. Co.,* L. R. 5 Q. B., 314, 22 L. T. (N. S.), 163, 166:

"The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense taken, if he is defendant, is an honest and just one; * * * here, if you can show that a man has been suborning false testimony and has endeavored to have recourse to perjury, it is strong to show that he knew perfectly well that his cause was an unrighteous one; * * *."

This court has announced a similar rule in *Deering* v. *Winona Harvester Works*, 155 U. S., 286, 300. It appeared that certain doubtful testimony had been secured by an agent of a concern which was interested in defeating the patent in suit. Mr. Justice Brown said:

"This entire evidence, taken in connection with certain damaging admissions made by Heller as to the compensation he received, both for his testimony in this case and for his concealment of certain facts in relation to another patent, throws discredit upon the whole case made by the defendant with respect to the anticipation of the Stewart patent."

Mayfield testified that he could recollect the names of only a few of his ex-employees who were about his place of business when the enormous amounts of the product labeled Koke are alleged to have been made by him. Within a month after Mayfield testified, petitioner located twenty-one of them and took their depositions—no one of them had ever heard of Koke. They were equally available to the respondents and were not called. This failure to produce as witnesses persons who could shed light on the facts is suspicious. This rule is applied in trade-mark cases.

Atlantic Milling Co. v. *Robinson*, 20 Fed., 217.

Atwood-Morrison Co. v. *Sipp Electric & Machine Co.*, 136 Fed., 859.

American Bell Tel. Co. v. *National Tel. Mfg. Co.*, 109 Fed., 976, 1018.

Bettendorf v. *J. R. Little Metal Wheel Co.*, 123 Fed., 433, 435.

Acme Flexible Clasp Co. v. *Cary Mfg. Co.*, 101 Fed., 269.

It seems clear, therefore, even if the impossible concession be made that Mayfield is unimpeached, the testimony given by the witnesses called by respondents in support of the contention that the word Koke has been continuously used by them and their alleged predecessor, Mayfield, since 1888 abounds in such improbabilities and is so saturated with the things which prompt courts to disbelieve evidence, however positive and by whatever number of witnesses given, that the defense here is inherently incredible. But when, as in this case, such evidence as is here adduced by the respondents, is used as corroborative of the fantastic story of the party most interested in their success—whose testimony was disbelieved by two District Judges and inferentially by the Circuit Court of Appeals on the same record here before this court, an individual whose demeanor on the witness stand is characterized by the Examiner of Interferences on this same record in a proceeding between petitioner and the Koke Company of America in the Patent Office, by the words "he apparently attached no importance to the fact that he was testifying under oath," this would seem to be a case for the application of Lord Stowell's dictum in *The Odin*, 1 C. Rob., 248, 252 (quoted in *The Dolphin*, 7 Fed. Cas., 3795):

"It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment."

SCHEDULE IX.

The Respondents' Contention That the Words Koke and Dope Are Used as Names for Soft Drinks Generally.

It is a fact, as this record clearly shows, that there are innumerable imitations of Coca-Cola upon the market. Without exception these imitations taste as much like Coca-Cola as it is possible to make them, and are indistinguishable from Coca-Cola in appearance. They are given various names, to a greater or less extent, imitating the name Coca-Cola. They are sold to the dealers at a cheaper price than Coca-Cola and their sale produces a greater profit. These products are not desired by the public and are unknown. They are seldom or never called for by their own names. This fact is clearly established by the testimony. For example—

C. H. Jouett, with the Live and Let Live Drug Company, St. Elmo, Tenn., a witness for the respondents, testified as follows (Rec., 1059):

"I never heard customers ask for Ko Nut."

The way Ko Nut is sold is shown by the testimony of J. E. Jones, a druggist of Hattiesburg, Miss., one of the respondents' witnesses (Rec., 1800, 1801):

"When customers came to my fountain first prior to the time I handled Konut and made a request for a drink of Koke or Dope I served them Coca-Cola. I never handled any other drinks but Coca-Cola. At that time I understood they wanted that. Konut syrup costs a dollar a gallon. Coca-Cola a dollar and a half. The difference in price is the reason I handled it.

* * * * *

When a customer comes in and asks for a Dope or Koke I thought when I give him any cola drink I was in my rights. I did not know what the customer wanted in my mind. I just gave him the cola product I had, the cheaper product. Any man is in business for his profits."

R. W. Elliott, a witness for The Coca-Cola Company, in charge of the Van Antwerp Drug Store soda department, in Mobile, testified (Rec., 566):

"I don't believe I ever did hear of a man ordering any other cola drinks. I have heard of other cola drinks, but I have never heard a man ask for another cola drink over the fountain."

George L. Seibert, soda dispenser for Dave S. Bauer, druggist, in Mobile, Ala., testified (Rec., 554):

"I have never heard anybody ask for any other cola drinks than Coca-Cola."

Dave S. Bauer, druggist, of Mobile, Alabama, testified (Rec., 543):

"I have never heard of anyone asking for 'Wise Ola,' 'Ala Cola,' 'My Coca,' 'Rye Ola,' 'Afri Cola' or 'Ko Nut,' except what traveling salesmen have told me."

These products are offered to dealers as substitutes for Coca-Cola and are designed only to trade on Coca-Cola's reputation and advertising.

C. G. Peters, druggist in New Orleans for twenty-eight years, says (Rec., 656):

"You ask if I know what others call for. I will tell you, I had so darn many come around there that I ran them all out; they come and sell a thing as Coca-Cola and tell you you can use it as Coca-Cola, and expect you to substitute and use it as Coca-Cola. Every one of them does that, all that have been in my store—there has been 'Gay Ola,' and 'My Ola'—I don't know how many different kinds, about a

dozen—all rivals of Coca-Cola, and not a one spent a dollar of advertising, and all trying to work on the advertising the Coca-Cola people are doing."

Pierre August Capdau, a pharmacist, for thirty years in New Orleans (Rec., 668):

"Well, occasionally, I see an advertisement—'Afri Cola,' and some other cola drinks, but not in the same way. These advertisements that I usually see don't impress me as being serious advertising, but simply sporadic—break out occasionally."

It is admitted that these products are imitations of Coca-Cola and are used to deceive.

J. E. Dunn, dispenser in employ of Nashville Drug Co., Nashville, Tenn., a witness called by the respondents, testified as follows (Rec., 1159):

"We handled Coca-Cola exclusively. I regard these other cola drinks as imitations used principally as substitutes. At our present store we handle nothing but Coca-Cola and in response to calls for Koke and Dope or a shot in the arm, I serve him with Coca-Cola and understand that is what he means the biggest portion of my time. They use those names as nicknames for genuine Coca-Cola.

* * * * *

These other cola drinks are cheaper and they make a little more money on it. Some do not run anything else in the fountain but that. Some places running up-to-date fountains, and a man calls for Coca-Cola he does not know what he is getting, except at this place up here, and it is very seldom they call for Coca-Cola straight, because practically everybody knew what we handled. If a man put it in his place, and serves it to everybody that comes in, no matter what they call for, it would be a substitute, but if a man puts it in and has Coca-Cola with it, and if a man calls for the substitute drink give it to him.

but unless he calls for the genuine stuff give it to him.

* * * * *

If a person asked for a Dope and I gave him this so-called substitute, if he was a stranger to me and I did not have a personal knowledge that he wanted Coca-Cola, I would consider I was giving him what he wanted. You will find the biggest majority of dispensers that are serving too will do that.

* * * * *

They give themselves the benefit of the doubt, they don't care so long as they get the drink to him and make more money out of it."

J. C. Price, one of the respondents' witnesses in the restaurant business in Nashville, testified (Rec. 1208):

"By competing drinks, I mean those drinks * * * sometimes spoken of as substitutes. Coca-Cola is the genuine * * * the product made in Atlanta."

(Rec., 1208):

"Those competing drinks cost the dealer less money than Coca-Cola, and there is more profit in it. When a man comes in and asks for a Koke or a Dope and if I have any of the competing drinks I give him the competing drink, but if I have not got the competing drink I give him the genuine, but if I have both I give the competing drink, because I can make more money on it."

(Rec., 1205.) In St. Louis:

"A. I had the Coca-Cola, the genuine Coca-Cola and another cola. When customers came in and asked for a Koke or a Dope I sold the competing drink. If they asked for Coca-Cola I give them the genuine Coca-Cola. We served the competing drink because we felt like they did not want the genuine, if they did they would call for it by the full name."

* * * * *

(Rec., 1206):

"Customers asking for Coca-Cola were served the genuine Coca-Cola. I do not know whether or not any of our customers in calling for Koke and Dope knew they were getting a different brand of drink from Coca-Cola, but they all seemed satisfied. Very seldom I ever had a man turn it down and say it was not the genuine—I mean a man come in and call for Dope and it was very seldom I had a man go away dissatisfied."

The foregoing is typical.

These substitutes are handled by the dealer because they can be sold to the consumer as Coca-Cola, a greater profit realized, and the consumer cannot tell the difference. Those dealers, who for fear of getting caught, hesitate to sell these substitutes when Coca-Cola is called for *by the name Coca-Cola,* do so when the intending purchaser uses a nickname for Coca-Cola in making his wants known, and the substituting dealer then justifies himself that he is not passing off because the customer has not asked for Coca-Cola by the name Coca-Cola, but has used some slang phrase, abbreviation or nickname which he understands to mean Coca-Cola, and which the dealer also so understands. The common nicknames used are Koke and Dope, which to the public mean Coca-Cola, and which the dealer knows, but the cheaper and more profitable and indistinguishable substitute is passed off because the substituting dealer is able to excuse himself by saying that the customer has not asked for Coca-Cola, and if he wanted Coca-Cola he would say Coca-Cola. This is very clearly shown from the testimony and it may safely be said that all of the witnesses produced by respondents in an attempt to

prove that the words Koke and Dope are common names for a class of drinks, can be grouped under this head. They are people who are attempting to justify their own fraud.

It is the common sales talk of respondents' salesmen. J. M. Penland (Rec., 1978) testified, that a representative of the respondents called upon him and offered to sell him Koke.

"He offered as his argument for our handling it, that they were in position to give us this price because they were not doing any advertising, that the average person who called for 'Coca-Cola' used the word 'coke', and that they would get the benefit of the advertising done by the Coca-Cola Company, and that the retail man could conscientiously justify himself in dispensing 'Koke' on such orders or on orders that he thought was intended to be 'Koke.' "

The testimony of Embrey (Rec., 1018) taken at Chattanooga, and quoted at length in Schedule VI, is entirely characteristic. First he handled only Coca-Cola. He recognized, as did his customers, that the name was abbreviated into Koke and that it was nicknamed Dope. This situation had existed for years. Then an imitation was offered at a lower price. This at first perhaps was not passed off on people who used the name Coca-Cola when making known their wants. The genuine was usually kept on hand to supply such. But when people used the familiar nicknames Koke and Dope the imitation was sold without comment and the customer did not know the difference. The failure of the purchaser to use the name Coca-Cola was the excuse of the dealer to sell the cheap imitation. The next step was inevitable, the imitation having demonstrated its

ability to escape detection when sold to people who asked for Koke or Dope, and meant Coca-Cola, was soon sold to people who used the name Coca-Cola. As E. A. Sharp (Rec., 1260), one of the respondents' witnesses admitted, "I do not know that I can say I never had served any other drink beside Coca-Cola when Coca-Cola was called for, because you are liable to get them mixed up in a soda fountain. They are so much alike I think anybody is liable to get them mixed up."

The inside of the whole contention that Koke and Dope mean any drink similar to Coca-Cola is exposed by the Koke Companies' witness, F. H. Willis, soda dispenser, in the employ of Ha Ha Store, No. 3 Arcade, Nashville, Tenn., as follows (Rec., 1192):

"Fletchers Cola was given when people asked for Dope or Koke. We did that because we made more money on it."

* * * * *

This witness handles Candy Cola made by Matthews in Nashville.

"Some of our customers know we are handling Candy Cola. I do not know whether the general public knows of Candy Cola or not. I never saw any advertising of Candy Cola. I do not know whether people who come into our store and ask for Koke or Dope expect to get Candy Cola or not, but they expect to get some kind of a cola that we serve there. I do not know what they expect to get. I give them Candy Cola.

I never sell Coca-Cola when Koke or Dope is asked for. I have instructions to sell Candy Cola when Koke or Dope is called for.

* * * * * *

We do not sell Candy Cola when Coca-Cola is

asked for. * * * I might have served Candy Cola in response to calls for Coca-Cola."

This witness was asked concerning the pumps of his soda fountain (Rec., 1194):

"No 5 is labeled Coca-Cola, and we keep Candy Cola in the Coca-Cola jar."

J. M. Smith, another of respondents' witnesses who handles Matthews product, said (Rec., 1185):

"There is a difference in profit in favor of Matthews' syrup, it costs less than Coca-Cola. I have Coca-Cola advertisements and signs 'Drink Coca-Cola,' * * * I have not any signs of Matthews' drink. * * * I have not been out of this Matthews mixture for sixty days. Mistakes are liable to happen."

The testimony in support of the contention that Koke and Dope are generic terms and apply to all drinks like Coca-Cola proves too much. The witnesses testify that these names apply to all drinks of this kind, *except Coca-Cola*—that they do not apply to Coca-Cola because Coca-Cola costs too much.

G. G. DeSouchet, one of the respondents' witnesses—in the saloon business in Birmingham, testified (Rec., 1350):

"Customers frequently came in and asked for Dope. I gave them something besides Coca-Cola, some of the other Cola drinks. I done that for the reason of the price, that is all. Not on account of the goods, that is Coca-Cola costs 70 cents up there and the other costs 50."

If the names Dope and Koke apply to a class of drinks, undeniably Coca-Cola is in that class—the words should apply to it as well as the others—and here lies the answer—the public pays five cents a glass for all of them—and cannot tell the difference.

The Coca-Cola nicknames are definite enough to the public—they mean Coca-Cola—it is only in the mind of the swindling dealer that there is any doubt about their meaning—a doubt to excuse a fraud and for revenue only.